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No. 8779

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES

CHARLES E. COLLETT,
Acting Assistant Attorney General,
ROY W. STODDARD,
Special Assistant to the Attorney General,
OSCAR A. PROVOST,
THOMAS E. HARRIS,
CLIFFORD E. FIX,
Attorneys, Department of Justice,
Washington, D. C.

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OPINIONS BELOW

The first opinion of the District Court (R. 384) is reported in 11 F. Supp. 158. Its supplementary opinion (R. 492) is reported in 14 F. Supp. 10.

JURISDICTION

This is an appeal from a final decree of the District Court of the United States for the District of Nevada, entered on April 14, 1936 (R. 521). This suit was brought by the United States, and the jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended,

28 U. S. C. § 41 (1). The pleadings showing the jurisdiction of the District Court are found in paragraph 1 of the amended bill of complaint (R. 7). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. § 225 (a).

QUESTIONS PRESENTED

1. Whether by the creation of an Indian reservation by executive action, the United States impliedly reserved, for the Indians (as in the case of reservations created by Treaty), waters flowing through the reservation, for irrigation purposes, where (1) the reservation was established to provide a permanent home for the Indians and to supply them with the means of becoming self-sustaining through agricultural pursuits and (2) all of the lands within the reservation were (and are) arid.

2. Whether, in a suit by the United States to quiet title and to enjoin the diversion of water impliedly reserved for the irrigation of lands within an Indian reservation, the implied reservation of water may be disregarded and relief denied, in whole or in part, because (1) the United States had sold to some of the defendants (or their predecessors) arid lands above the reservation which were irrigable only from the same source as the reservation lands without advising them that the water had been reserved; (2) the defendants had appropriated water and constructed irrigation

works for many years, without protest by the Government until the institution of the instant suit; (3) the superintendent of the reservation had applied to the State for a permit to appropriate waters; and (4) an engineer of the Office of Indian Affairs had recommended that a reservoir be built for the reservation—despite the fact that the suit is brought by the United States in its sovereign capacity and on behalf of the Indian tribe.

STATEMENT

This suit was brought by the United States to quiet title to its right to 150 cubic feet per second of the water of the Walker River, the amount of water necessary to irrigate the irrigable lands of the Walker River Indian Reservation. The defendants, 253 in number, claim rights in the water of that river.

The amended bill of complaint alleged: On November 29, 1859, the United States, in order to protect certain Pahute and other Indians in lands which they were occupying, and in order to afford them an opportunity to learn husbandry and to become civilized, set aside for their use lands now constituting the Walker River Indian Reservation (R. 8–9). These lands were (and are) incapable of producing crops without irrigation, for which the Walker River and its tributaries are the only source of water (R. 7–11). Approximately 11,000 acres of these lands are irrigable, and for the irrigation of this acreage and for domestic and other

uses upon the reservation there is required 150 cubic feet per second of water (R. 9). By the creation of the reservation the United States reserved from appropriation, and set aside for use upon the reservation, that quantity of the water of the Walker River and its tributaries (R. 10). About 2,000 acres of the reservation lands are irrigated at the present time (R. 9). The defendants are using the water of the river and its tributaries for irrigation and are preventing it from reaching the reservation (R. 12). The United States recognizes the decree in *Pacific Livestock Co.* v. *Rickey,* Equity No. 731, adjudicating rights in the waters of Walker River, as determining the rights of the defendants as among themselves (R. 15).

The complaint prays that it be adjudged that the United States has the first right to 150 cubic feet per second of the water of the river; that the defendants be enjoined from interfering with that right; that a water master be appointed to carry out the decree; that the relative rights of the parties in the water of the river be determined; and that the United States have such other relief as may be proper (R. 17–18).

Some 250 answers and counterclaims were filed by the respective defendants.[1] The defendants

[1] By stipulation (R. 995) the answers and counterclaims of 231 defendants are omitted from the printed record. The omitted answers are in substance the same as the seven answers printed in the record.

deny that when the United States created the reservation it reserved water for the Indians, and deny that they are wrongfully diverting water (R. 29, 33, 60, 62, 108, 110, 128, 131, 150, 153, 177, 179, 217, 220). The defendants admit that they are diverting water under the decree in suit No. 731 (R. 37, 66, 114, 136, 158, 184, 225), and allege rights to use specified quantities of the water of the Walker River, with stated dates of priority, for the irrigation of their respective lands (R. 40, 68, 84–92, 115, 140, 163–170, 184–187, 229–232). The defendants further allege that the United States, through its officers and agents, knew of the claims of the defendants; that the United States without objection permitted them to expend millions of dollars for irrigation works, houses, and other improvements; that the United States issued patents to some of the defendants under the Desert Land Law and the homestead laws, under which laws a showing of a sufficient water right was a condition precedent to the issuance of a patent (R. 95–96, 119–121, 159–160, 190–192, 197, 227–228); and that by reason of these facts the United States is estopped from claiming any water by virtue of its withdrawal of lands for the Indian reservation, or otherwise than under the doctrine of appropriation (R. 96, 121, 160, 193, 228). Some of the defendants allege also that the United States has been guilty of laches (R. 138, 160, 228). The defendants pray that the United States take nothing

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and that the water rights claimed by the respective defendants be decreed to them (R. 47, 97, 122, 143, 172, 212, 241). The answer of the Sierra Pacific Power Company claims riparian rights for its land in California, and alleges that its rights were not determined by decree No. 731 (R. 387).[2]

The issues raised by the pleadings were referred to a Special Master (R. 243–244). The United States and the defendants (except the Sierra Pacific Power Company), in order to shorten the trial, stipulated that all of the defendants' rights should be determined upon the doctrine of appropriation, and that the rights of all defendants who were parties to suit No. 731 should stand as therein decreed, subject to the rights and priorities of the United States as determined by the court (R. 501, 973). The rights of a number of defendants who were not parties to suit No. 731 were stipulated upon the same basis (*id.*).

In summary, the evidence showed:

The Walker River is non-navigable. It rises in California, but its main course lies in Nevada, and it empties into Walker Lake in that State (R. 387–389, 494–496). The Walker River Indian Reservation includes the land around Walker Lake, and the land along each side of the river for approximately 30 miles above the lake. It contains approximately 86,400 acres of land, of which about

[2] No appeal has been taken by the Sierra Pacific Power Company, and no separate question as to its rights is presented to this court.

10,000 acres are irrigable and about 2,100 acres are now under irrigation (R. 246, 496, 627). The lands of the Walker River basin, including the reservation lands, are incapable of producing crops without irrigation, and there is no water for their irrigation except that of the river (R. 496).

In 1859 the lands now included in Nevada were a part of Utah Territory. On November 25, 1859, the United States Indian agent for that Territory wrote the Commissioner of Indian Affairs that there was a general "stampede" of persons from California to the mining localities within the agency, which increased the necessity for reserving for the Indians "a sufficient portion of their lands to enable them to sustain life" (R. 569). He recommended that part of the Truckee River valley (now the Pyramid Lake Indian Reservation), and part of the Walker River valley (now the Walker Lake Indian Reservation), be reserved for the Indians, the boundaries of the suggested reservations being indicated on an attached map (R. 570). On November 26, 1859, the Commissioner of Indian Affairs wrote the Secretary of the Interior inviting the latter's attention to the agent's letter and stating that although but a small portion of the land in the proposed reservations is "suited for agricultural purposes, yet it is believed that it will be sufficient for the sustenance of the Washoe and Pahute Tribes of Indians, in connection with the fish which they may obtain from Pyramid and

Walker Lakes" (R. 571). On November 29, 1859, the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office requesting him to direct the Surveyor General of Utah Territory to respect the reservation of these tracts of land, as indicated upon an attached map, when the public surveys should be extended over that portion of the territory, and requesting that in the meantime the proper local land offices be instructed to respect the reservations upon the books of their offices (R. 572). The Commissioner of the General Land Office, on December 9, 1859, instructed the Surveyor General at Salt Lake City to reserve for Indian purposes the tracts of land in question (R. 573). The United States took immediate steps to prevent trespassing upon the reservations and subsequently their boundaries were surveyed (R. 577–581, 595, 596). On March 19, 1874, President Grant ordered that the reservation on Walker River, as surveyed, be withdrawn from sale or other disposition, and set apart for the Pahute Indians residing thereon (R. 580–581). The reservation had, however, been effectively created on November 29, 1859, when the lands were set aside for the Indians by the Commissioner of the General Land Office; the subsequent order of the President merely formalized and perpetuated what had already been done (R. 587, 588, 591, 593–594, 599, 648–651, 671–675).[3]

[3] Both the Master (R. 258–260) and the District Court (R. 392) found that the reservation was created November

Both the United States and the Indians desired, from the time the reservation was created, that the Indians should support themselves by agriculture (R. 587, 591, 592, 599). The United States immediately began to encourage and teach the Indians to practice farming and irrigation, and furnished them with seeds and implements for farming (R. 587, 588, 591, 593–594, 599, 648–651, 671–674). Within a few years after the reservation was set aside the United States commenced the construction of ditches and dams for the diversion of water of the Walker River for use upon the reservation (R. 434, 673, 674–675). From time to time the United States enlarged and extended the irrigation ditches upon the reservation until there are now two canals thereon having a combined length of 17 miles and a combined capacity of 115 cubic feet per second, and lateral ditches having a combined length of 13 miles (R. 434, 496, 617) capable of irrigating 3,600 acres without further extension (R. 614). On the 2,100 acres under irrigation the Indians produce valuable crops of alfalfa, grain, and vegetables, and raise fowl and livestock, part of which they sell (R. 434, 617). There are approximately 500 Indians on the reservation (R. 275, 496). Ninety-six individual Indians are farm-

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29, 1859. The authorities sustaining their view are collected in the Master's report (R. 258–260). Particularly conclusive are *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283, 288; *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *Central Pacific Railway Company*, 45 L. D. 502.

ing parts of 140 allotments of 20 acres each and 96 allotments have homes on them (R. 434, 496). Five hundred and four allotments have been made to date (R. 656).[4]

The lands of the defendants are situated in the Walker River basin above the reservation. They were acquired by the defendants or their predecessors from the United States under acts of Congress, the earliest title originating shortly after the creation of the reservation (R. 497). Successive appropriations of water of the river were made for the irrigation of these lands, the earliest appropriation being in 1860 (R. 497), until all the water of the river had been fully appropriated (R. 270–271, 398). In order to supplement the water supply for irrigation the defendants, in 1922 and in 1924–25, constructed large and expensive irrigation works (R. 497, 625, 778). The defendants now irrigate a total of about 111,000 acres (R. 499). No objection was made by the United States to the appropriation of water by the settlers (R. 270–271, 398–399, 497–498), or to their construction of irrigation works (R. 497), and no proceedings were taken by the United States to protect its water rights until the present suit, brought in 1924 (R. 402, 497–498).

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[4] Allotments were made in November 1906, under the Act of May 27, 1902, 32 Stat. 260, and the General Allotment Act, 24 Stat. 388. The trust period of 25 years provided by the General Allotment Act was extended for an additional 10 years by Executive Order No. 5730, issued October 8, 1931, and was extended indefinitely by the Wheeler-Howard Act of 1934, 48 Stat. 984.

The United States was given an opportunity to become a party to suit No. 731, which was brought in 1904 and decided in 1919, but did not do so (R. 497–498). The Master in that suit found that the United States had appropriated from the Walker River 22.93 cubic feet of water per second, with dates of priority of 1868, 1872, 1875, 1883, and 1886, and had irrigated thereby 1,905.55 acres of land of the reservation (R. 387, 437, 499). The decree did not make any provision for the rights of the United States (R. 786).

In 1910 the superintendent of the reservation, on behalf of the Indians, applied to the State of Nevada for a permit to appropriate water of the river (R. 498, 822). The permit was granted but later cancelled (R. 824).

In 1926 Congress (Act of June 30, 1926, 44 Stat. 779) authorized a reconnaissance to determine the feasibility of constructing a dam on the Walker River to conserve its water for irrigation (R. 399–400, 498). Pursuant to this authorization a report was made recommending, among other things, that a storage reservoir be created for the reservation (R. 400–401, 498). It does not appear from the record that any action was taken on this report.

The Master filed his report (R. 244) and recommended findings of fact and conclusions of law (R. 291) and a decree (R. 317). The report of the Master expressed the view that when the United States created the reservation in 1859 it impliedly

reserved water of the Walker River for the irrigation of reservation lands (R. 261–270); that the United States was not estopped by the failure of its officials to inform purchasers of land in the Walker River valley of its right to the use of sufficient water of the river for the irrigation of the irrigable lands of the reservation, or by reason of the delay of its officials in taking legal steps to enforce its claims (R. 271–274); that, however, it would be inequitable to allocate to the United States water for the irrigation of 10,000 acres of land since it had under irrigation only 2,100 acres, since there was no substantial demand by the Indians for the irrigation of additional acreage, and since the number of Indians on the reservation was not increasing (R. 275). The Master concluded, accordingly, that the United States should be granted a right to 26.25 feet of water per second, for the irrigation of 2,100 acres of land, with a priority of 1859 (R. 275, 323).

Both the United States and the defendants filed exceptions to the Master's report and proposed findings, conclusions, and decree (R. 335–360), the United States contending that it had a right to the use of 150 cubic feet of water per second for the irrigation of the 10,000 acres of irrigable lands in the reservation, and that this right was not barred by any equitable defense (R. 335–342).

On June 6, 1935, the District Court filed its opinion (R. 384, 11 F. Supp. 158). The District Court

held that neither the claim of the United States to 150 cubic feet of water per second nor the proposed decree of the Master awarding to it 26.25 cubic feet with a priority of 1859 could be sustained (R. 409–410). It held that the United States did not impliedly reserve any water by the creation of the reservation, and that the rights of the United States were, therefore, to be adjudged under the doctrine of appropriation as established by the State of Nevada (R. 410).[5] The Court referred the case back to the Master to take further evidence upon one point, and directed him to prepare and submit findings of fact and conclusions of law consistent with its decision (R. 427–428).

The Master again filed recommended findings of fact, conclusions of law, and a decree (R. 430, 458). After argument on exceptions filed by the United States and by some of the defendants (R. 474–490), the District Court, on March 21, 1936, filed a supplementary opinion (R. 492, 14 F. Supp. 10). This opinion, after stating that the United States contends that there was an implied reservation of water, declares (R. 492):

> Even if a reservation of water may be implied in the executive order, however the Indian rights may be defined or labeled in

[5] The opinion of the District Court devotes considerable space to demonstrating that by the Desert Land Act of 1877, if not before, the United States opened the waters of the streams of the public domain to appropriation under state laws, such appropriation to be "subject to existing rights,"

> this instance, this court is of the opinion that the facts and circumstances have placed the white settlers in an inexpugnable position.

The opinion then recites that the settlers acquired lands from the United States and water rights by appropriation; that they have enjoyed undisturbed possession of their lands and water rights for more than fifty years, and that to dispossess them would return to waste lands which they, with the acquiescence of the government, reclaimed from the desert (R. 492–493). The opinion concludes (R. 493):

> Under such facts and circumstances this court is not moved to give a decree destroying the rights of the white pioneers.

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and that, if water of the Walker River was not impliedly reserved by the creation of the reservation in 1859, before the Desert Land Act, the United States has only such water rights for the reservation as it has itself acquired by appropriation (R. 403–410). *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, is quoted at length to sustain this position. The United States, however, has always conceded that, if no water was impliedly reserved by the creation of the reservation, it has only such water rights as it has acquired by appropriation. And the opinion of the District Court concedes that if water was impliedly reserved by the creation of the reservation, that reservation of water was not affected by the Desert Land Act, since that Act provided that appropriations of water under it would be "subject to existing rights" (R. 410). Accordingly it is not perceived that this portion of the District Court's opinion presents any issue warranting further discussion.

The exceptions of the United States were overruled (R. 492–493).

Thereafter the District Court filed findings of fact and conclusions of law, and entered its decree (R. 494). In its conclusions of law the Court states that even if a reservation of water might be implied in the order of 1859, "yet the facts and circumstances here shown impel the conclusion that the interests of the white settlers, enjoyed without challenge for more than fifty years, should not be disturbed" (R. 515). The Court concluded that the doctrine of appropriation applied to the claims of the United States, and that it was entitled, by right of appropriation,[6] to divert waters of the stream to the extent of 22.93 cubic feet per second, for the irrigation of 1,905.55 acres, with priority as of the years 1868, 1872, 1875, 1883, and 1886 (R. 499, 515–516). The District Court entered its decree framed accordingly (R. 531).

The United States has taken this appeal.

SPECIFICATIONS OF ERRORS TO BE URGED

The United States will rely upon its assignment of errors Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11. Assignment No. 2 is waived, as it is not believed that this assignment is pertinent to the legal issues here involved.

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[6] The Special Master in suit No. 731 had found, and it was conceded by the defendants in this suit, that the United States had appropriated a total of 22.93 cubic feet per second, with the dates of priority given above (R. 499).

SUMMARY OF ARGUMENT

I

The United States, when it segregated the lands in the Walker River Indian Reservation on November 29, 1859, as a permanent home for the Pahute Tribe of Indians, impliedly reserved for the Indians sufficient water of Walker River for the irrigation of the irrigable lands of the reservation. *Winters* v. *United States,* 207 U. S. 564; *Conrad Inv. Co.* v. *United States,* 161 Fed. 829 (C. C. A. 9). The doctrine that when the United States sets aside arid lands as a home for Indians it impliedly reserves for the Indians water for irrigation, rests upon a presumption that the United States recognized and provided for the needs of the Indians, and does not depend upon whether there was a treaty or agreement with the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78.

II

The United States is not, under the facts and circumstances of this case, barred from the relief it seeks, either in whole or in part, by laches, estoppel, or any other principle of equity. This suit is brought by the United States in its sovereign character (*United States* v. *Minnesota,* 270 U. S. 181, 194), and the United States cannot, in a suit so brought, be barred by laches. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735; *United States* v. *Beebe,* 127 U. S. 338, 344.

Even if it be assumed that the United States can, under some circumstances, be estopped, the acts and omissions relied upon in this case as estopping the United States are largely disposed of by the rule that the United States cannot be estopped by unauthorized conduct of its agents. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *Cramer* v. *United States,* 261 U. S. 219, 234. Furthermore, elements essential to an estoppel between individuals are lacking in this case. No estoppel arises from mere delay or acquiescence, even when expenditures are made in reliance thereon. *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427, 454 (S. D. Calif.); *City of Mobile* v. *Sullivan Timber Co.,* 129 Fed. 298 (C. C. A. 5). Before an estoppel can arise there must be "intended deception" or "such gross negligence * * * as to amount to constructive fraud, by which another has been misled to his injury." *Brant* v. *Virginia Coal & Iron Co.,* 93 U. S. 326, 335. That has not been shown here. Finally, the Indians are wards of the United States, and the conduct of a guardian cannot estop a ward. *Shamleffer* v. *Peerless Mill Co.,* 18 Kan. 24.

The right of the Indians is not to be limited by any application of general concepts of fairness to water only for the irrigation of the reservation lands now irrigated. No principle of equity would justify such a diminution of their right. *Pan American Co.* v. *United States,* 273 U. S. 456;

Heckman v. *United States,* 224 U. S. 413. The decision of this court in *Conrad Inv. Co.* v. *United States,* 161 Fed. 829, is conclusive that the Indians are entitled to be protected in their right to water sufficient not only for their present needs but for their possible future needs.

ARGUMENT

I

The United States, by the creation of the Walker River Indian Reservation, impliedly reserved for the Indians sufficient water of the Walker River for the irrigation of the irrigable lands of the reservation.

This argument is directed to the following assignments of error:

I

> That the Court erred in failing to find and decree that the plaintiff, by necessary implication, set aside and reserved sufficient of the then unused and surplus waters of the Walker River and its tributaries for the future irrigation of the irrigable lands of the Walker River Indian Reservation, at the same time it reserved and set aside the lands for said Indian Reservation on November 29, 1859 (R. 541).

VI

> That the Court erred in making its conclusion of law I that the law or Doctrine of Appropriation applies in this case to plaintiff, and the same is erroneous, contrary to law and not sustained by the evidence of findings in this cause (R. 544).

VII

That the Court erred in making its conclusion of law II that plaintiff is entitled only by right of appropriation to the amounts of water from the stream system with the priorities and points of diversion for the irrigation of the acreages set forth in the findings (R. 544).

VIII

That the Court erred in overruling plaintiff's exceptions filed herein January 18th, 1933, and September 26th, 1935, to the Special Master's findings and proposed decrees filed herein December 30th, 1932, and August 9th, 1935 (R. 545).

IX

That the Court erred in not finding and decreeing that said Reservation included 10,000 acres of irrigable land susceptible of irrigation.

X

That the Court erred in not finding and decreeing that plaintiff reserved the right, by setting aside and reserving said Walker River Indian Reservation, on November 29, 1859, to divert water from the Walker River, to the extent required for the irrigation of the cultivated lands of said Reservation, up to, but not to exceed, a total of 10,000 acres, and that the diversion of such water be limited

to a flow at the rate of 1.50 cubic feet of water per second of time for each 100 acres of such cultivated lands from March 1st to September 30th of each year (R. 545).

XI

That the Court erred in not holding and decreeing that plaintiff had the present right to divert 31.50 cubic feet of water per second of time from the Walker River for the irrigation of 2,100 irrigable acres of said Walker River Indian Reservation, with a priority of November 29, 1859, instead of 1,905.55 irrigable acres with priorities of the years 1868, 1872, 1875, 1883, and 1886; and further in not holding and decreeing that plaintiff had the further right to divert such additional amounts of water with a priority of November 29, 1859, as may be required from time to time, at the same rate of flow, for the irrigation of such additional irrigable lands as may in the future be placed in cultivation up to, but not to exceed, a total of 10,000 acres (R. 546).

In *Winters* v. *United States,* 207 U. S. 564, affirming 143 Fed. 740, 148 Fed. 684 (C. C. A. 9), the Supreme Court held that the creation of an Indian reservation (in that case by agreement between the United States and the Indians, ratified by act of Congress) impliedly reserved for the Indians, and withheld from subsequent appropriation by others, water of the streams of the reservation for the irrigation of their lands.

> The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. (207 U. S. 564, 576.)

This contention, the court said, could not be accepted, especially in view of the rule that agreements with Indians are to be construed in favor of the Indians. The court rejected also the further contention that the United States had repealed the reservation of water for the Indians by the admission into the Union of Montana, the State in which the reservation was situated. It would be extreme to believe, the court said, that Congress—

> took from them the means of continuing their old habits, yet did not leave them the power to change to new ones. (207 U. S. 564, 577.)

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The doctrine established by the *Winters* case was thus stated by this Court in *Conrad Inv. Co.* v. *United States,* 161 Fed. 829, 831–832:

> This court affirmed the decree [in the Winters case], holding that the United States, by treaties with the Indians on the reservation, had impliedly reserved the waters of Milk river for the benefit of the Indians on the reservation to the extent reasonably necessary to enable them to irrigate their lands, and that grantees and settlers on public lands outside of their reservation could not acquire, under the desert land laws of the United States or the laws of the state of Montana relating to the appropriation of the waters of the streams of that state, the right to divert the waters of Milk river to the prejudice of the rights of the Indians residing upon that reservation. * * *
>
> The law of that case is applicable to the present case, and determines the paramount right of the Indians of the Blackfeet Indian reservation to the use of the waters of Birch creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other useful purposes. The Government has undertaken, by agreement with the Indians on these reservations, to promote their improvement, comfort, and welfare, by aiding them to become self-supporting as a peaceable and agricultural people. The lands within these reservations are dry and arid, and require the di-

> version of waters from the streams to make them productive and suitable for agricultural, stock raising, and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the Government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters Case.

The *Winters* and *Conrad Inv. Co.* cases have been followed in *United States* v. *Powers,* 94 F. (2d) 783 (C. C. A. 9, 1938); *United States* v. *Parkins,* 18 F. (2d) 642, 643 (D. Wyo. 1926); *United States* v. *Hibner,* 27 F. (2d) 909, 911 (D. Idaho, 1928); *United States* v. *Cedarview Irrigation Co.* and *United States* v. *Dry Gulch Irrigation Co.* (Equity Nos. 4427 and 4418, D. Utah, 1923—unreported); *United States* v. *Orr Water Ditch Co.* (Equity Docket A–3, D. Nev., 1926—unreported); *United States* v. *Morrison Consol. Ditch Co.* (Equity No. 7736, D. Colo., 1931—unreported); *Anderson* v. *Spear-Morgan Livestock Co.,* 79 P. (2d) 667 (Mont. 1938). And compare *Skeem* v. *United States,* 273 Fed. 93 (C. C. A. 9, 1921); *Mason* v. *Sams,* 5 F. (2d) 255 (W. D. Wash. 1925).

The Master held that the doctrine of the *Winters* case applied to the case at bar; that the creation of the reservation in 1859 impliedly reserved for the

Indians waters for the irrigation of the reservation lands. He said (R. 261–262):

> The Reservation was established for the use of the Indians. Was it the intent that the Reservation should consist merely of a refuge for the Indians where they might hunt and fish? The whites had encroached upon the greater portion of the lands upon which the Indians had theretofore been accustomed to hunt and fish. The game has been driven off. The sustenance for the Indians was becoming more and more limited, and if the Indians were to be supplied with the necessaries of life in any other manner than through the system of charitable donations, the pursuit of agriculture upon the Reservation was an actual necessity. Furthermore, if the Government did not contemplate the support of the Indians through the pursuit of agriculture, why did it reserve ten thousand acres, or thereabouts, of irrigable land lying on either side and along the Walker River, why not have included only Walker Lake, the fishing ground of the Indians, and the larger area of rough country unsuitable for irrigation? That the Government had broader views for the sustenance of the Indians is evidenced by the fact that shortly after the Reservation was established steps were taken to promote thereon agricultural pursuits by the construction of ditches, to convey water for irrigation purposes. Said ditches have from

> time to time been enlarged and extended until there are at present seventeen miles of main canals and thirty miles of lateral ditches constructed for the diversion of water from Walker River and the Government has applied water from the river to approximately two thousand one hundred acres of irrigable lands.

The record is specific that the reservation was created to reserve for the Indians sufficient of their lands to enable them to sustain life (R. 569), and that it was contemplated that the Indians would support themselves partially by agriculture (R. 571, 582, 587). That the lands of the reservation can be cultivated only if irrigated is not disputed.

The District Court held, in its first opinion, that the creation of the Walker River Indian Reservation did not impliedly reserve water for the irrigation of the reservation lands (R. 403–410). The *Winters* case, it said, was based solely upon a treaty or agreement with the Indians, while there was no treaty or agreement in this case, and, indeed, could have been none because the Indians and whites were at war for some time subsequent to 1859 (R. 396). In its supplementary opinion the District Court did not decide whether there was an implied reservation of water for the Indians, but said that even if there was, "facts and circumstances" had placed the settlers in an "inexpugnable position." (R. 492.)

The doctrine of the *Winters* case, the United States contends, is controlling here. That doctrine, it is submitted, does not depend upon whether or not a reservation was created pursuant to an agreement with the Indians, as the District Court held in its first opinion, but upon the principle, followed by the Master, that when the United States sets aside as a home for Indians lands which would be sufficient for their support only if cultivated, and which could be cultivated only if irrigated, it must be inferred that the United States reserved for the Indians water for the irrigation of the reservation lands.

In the *Winters* case, it is true, the Supreme Court emphasized that the Indians had agreed to the creation of the reservation, and that they probably would not have so agreed unless water for irrigation had been reserved for them (207 U. S. 564, 576). But the Court also expressed disbelief that the United States would have deliberately accepted an agreement not reserving water to the Indians (*id.*), and it said, in rejecting the contention that Congress had subsequently taken the water from the Indians, that "it would be extreme to believe" that Congress "took from them the means of continuing their old habits yet did not leave them the power to change to new ones." (207 U. S. 564 at 577.) The latter consideration, it is clear, is the decisive one: when the United States fixes as a permanent home for Indians lands which will sup-

port them only if irrigated, it must be presumed that water for irrigation is reserved for the Indians, regardless of what particular procedure was followed in creating the reservation.

> The lands being arid, the need of water is manifest, and so it must be considered that it was likewise designed that the Indians should have and enjoy the use of water in available streams wherever their needs might require. (*United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123, 129.)[7]

That the doctrine of implied reservation of waters for Indians rests upon a presumption of recognition of and provision for their needs by the United States, and is not dependent upon a treaty or agreement with the Indians, is conclusively shown by the decision of the Supreme Court in *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78. That was a suit by the United States to enjoin the defendant from maintaining a large fish trap in navigable waters adjacent to the Annette Islands in Alaska. The United States had by act of Congress set apart "the body of lands known as Annette Islands" as a reservation for the use of the

[7] The Court added: "Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art."

Metlakahtla Indians. No agreement or treaty was involved, and the Indians had no claim to the Islands, they having but recently immigrated from Canada. The question presented was whether the reservation was limited to the Islands proper, as the defendant contended, or whether it included the waters adjacent to the Islands, so as to confer upon the Indians exclusive fishing rights in those waters. The act was silent in this respect. The Supreme Court held for the United States. The question, it said, was to be determined in view of "the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians, and the object to be attained." (P. 87.) The opinion continues (pp. 87–89):

> That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. * * * The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. * * *
>
> The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. * * *

> The circumstances which we have recited shed much light on what Congress intended by "the body of lands known as Annette Islands." The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. * * *
>
> This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.

The doctrine of the *Winters* case was applied, although the reservations involved were created by federal executive action, and not by or pursuant to any agreement with the Indians, in *United States* v. *Cedarview Irrigation Co., United States* v. *Dry Gulch Irrigation Co.* (Equity Nos. 4427 and 4418, D. Utah, 1923—unreported); and in *United States* v. *Orr Water Ditch Co.* (Equity Docket A–3, D. Nev., 1926—unreported). The *Orr Water Ditch Co.* case was decided by the same court which decided the present case, and it involved the Pyramid Lake

Indian Reservation, which, it will be remembered (see *supra,* p. 7), was created at the same time and by the same order as the Walker River Indian Reservation. The restraining order in that case, signed by Judge Farrington, which is still in effect, recites:

> By order of the Commissioner of the General Land Office made on December 8, 1859, the lands comprising the Pyramid Lake Indian Reservation were withdrawn from the public domain for use and benefit of the Indians and this withdrawal was confirmed by order of the President on March 23, 1874. Thereby and by implication and by relation as of the date of December 8, 1859, a reasonable amount of the water of the Truckee River, which belonged to the United States under the cession of territory by Mexico in 1848, and which was the only water available for the irrigation of these lands, became reserved for the needs of the Indians on the reservation.

Neither the courts nor the administrative officers of the United States have made any distinction between reservations created by executive action and reservations established by treaty, either as to the duties of the United States toward the Indians or as to the character or extent of the Indian rights. In *Spalding* v. *Chandler,* 160 U. S. 394, the court said (pp. 402–403):

> When Indian reservations were created, either by treaty or executive order, the In-

> dians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

In *M'Fadden* v. *Mountain View Min. & Mill. Co.,* 97 Fed. 670 (reversed on other grounds, 180 U. S. 533), this court said (p. 673):

> On the 9th day of April 1872, an executive order was issued by President Grant, by which was set apart as a reservation for certain specified Indians [certain lands] * * * The effect of that executive order was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion upon the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes.

Similarly, in *Gibson* v. *Anderson,* 131 Fed. 39, this court, after quoting from the *M'Fadden* case, said (p. 42):

> There can be no doubt that such a reservation [executive order] stands upon the same plane as a reservation made by treaty or act of Congress.

In 34 Op. Atty. Gen. 171, Attorney General (now Mr. Justice) Stone, in giving it as his opinion that the oil and gas leasing act applied to executive order reservations, said (p. 181):

> The important matter here, however, is that neither the courts nor Congress have made

> any distinction as to the character or extent of the Indian rights, as between executive order reservations and reservations established by treaty or act of Congress.

Indeed, it is difficult to see upon what theory the circumstance whether a reservation was created pursuant to an agreement with the Indians, or solely upon the initiative of the United States, can be regarded as decisive of whether water was impliedly reserved for the Indians. It is not to be thought in the one case any more than in the other that the United States meant to deprive the Indians of all possibility even of sustaining themselves by agriculture. It cannot be doubted that the United States had power to create the reservation and assign the Indians to it regardless of their consent. See *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 565.[8]

Whether Indian reservations have been created pursuant to agreements with the Indians or by decision of the United States alone appears to have been largely a matter of chance. For example, while the reservation involved in the *Winters* case

[8] The District Court apparently thought that the reservation was created, not only without a formal agreement between the United States and the Indians, but against the will of the latter (R. 396–398). It appears from the record, however, that the reservation was set aside for the protection of the Indians and in order to placate them (R. 569–570, 575, 585–586). It seems probable, therefore, that the creation of the reservation had at least the tacit consent of the Indians.

was created pursuant to an agreement with the Indians, the larger reservation out of which it had been carved had been created by act of Congress without any agreement with the Indians. See 207 U. S. 564, 567; Act of April 15, 1874, 18 Stat. 28. To decide the water rights of the Indians according to this fortuitous circumstance would be palpably unjust.

II

The United States is not barred from the relief it seeks by laches, estoppel, or any other principle of equity.

This argument is directed to the following assignments of error:

III

> The Court erred in making and adopting that portion of finding No. V, finding that it has not been shown that there is the necessity or demand by the Indians for the cultivation of a larger area of land than 2,100 acres (R. 542).

IV

> The Court erred in finding:
>
> > That plaintiff failed to make objection to appropriations of water by white settlers (defendants) and to their construction of expensive irrigation works (finding VI);
> >
> > That plaintiff took no proceedings to determine or preserve its rights as against upstream white settlers until the commencement of this suit (finding VI);

That plaintiff failed to become a party to a former suit to determine the relative rights of the stream, commenced in 1904 and determined in 1919, although plaintiff was invited to file its pleadings therein (finding VI);

That plaintiff, as late as 1910, relied upon the Doctrine of Appropriation for its rights (finding VI);

That Congress authorized a reconnaissance to determine cost and feasibility of a reservoir site for said Indian Reservation (finding VI);

That the Supervising Engineer recommended to the Government that a storage Reservoir be created for the Indian lands of said Walker River Indian Reservation by construction of a dam site and that the irrigation system thereof be extended to cover the entire irrigable area of the Reservation (finding VI);

That it was found by Special Master Henry Thurtell, in a former suit to which the United States was not a party, that the United States of America had appropriated from the Walker River and applied to beneficial use upon the lands of said Reservation for the use of the Indians the quantities of water in cubic feet per second with dates of priority and the number of acres irrigated thereby, set forth in finding VI and in the decree;

That at the time of the commencement of this suit the annual crop pro-

duction of lands irrigated by white settlers was of the value upwards of $2,000,000 (finding IX);

That the assessed valuation of the lands within the boundaries of defendant, Walker River Irrigation District, is approximately $4,000,000 (finding IX);

That the population of said defendant District is approximately 3,000 and that of Bridgeport and Antelope Valleys in California is approximately 600 (finding IX);

and the Court further erred in concluding and decreeing from said findings that plaintiff was barred and estopped from claiming and being decreed a right to divert and use water of said stream system for the irrigation of the irrigable lands of said Indian Reservation to the extent required each year for the irrigation of such of said lands as may then be in cultivation, up to, but not to exceed, a total of 10,000 acres with a priority as of November 29, 1859 (R. 542–544).

V

That the Court erred in making its conclusion of law that even if a reservation of water may be implied by setting aside the Walker River Indian Reservation, on November 29, 1859, yet the facts and circumstances shown in evidence impel the conclusion that the interests of the white settlers

> (defendants herein), enjoyed without challenge for more than fifty years, should not be disturbed (R. 544).

The defendants, in their answers, contended that even if the United States did, by the creation of the reservation in 1859, impliedly reserve water of the Walker River for the Indians, the United States is now estopped from claiming any water for the Indians other than under the doctrine of appropriation, by reason of certain facts alleged in the answers (R. 93–96, 119–122, 137–138, 159–160, 190–193, 197–199, 208–211, 227–228).[9] Some of the defendants contended also that the United States has been guilty of laches (R. 138, 160, 228).

The Master expressed the view that the United States is not estopped to assert the implied reservation, but that "equitable principles" limit its rights to water for the acreage now under irrigation on the reservation (R. 273–275).

The District Court, in its first opinion, held that the creation of the reservation did not impliedly reserve water for the Indians, and that the water rights of the United States were therefore to be adjudged in accordance with the laws of appropriation as established by Nevada (R. 410). Although that opinion states at some length the facts cited by the defendants as estopping the United States, it

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[9] The allegations thus relied upon are summarized, *supra*, p. 5. The evidence bearing upon these allegations is summarized, *supra*, pp. 10–11.

does not rely upon them other than by the assertion that (R. 403):

> All of such actions and circumstances above related, when considered with the "silent acquiescence" of the government to the diversion of water by the white settlers, amount to an administrative construction of the local laws then in force and "should be respected and not overruled except for cogent reasons." [Citing cases].[10]

In its supplementary opinion (R. 492–493), however, and in its conclusions of law (R. 515)[11] the District Court held that under the "facts and circumstances" the water rights of the defendants were invulnerable to attack by the United States, regardless of whether water was impliedly reserved for the Indians by the creation of the reservation in 1859. The "facts and circumstances" stated by the Court deal largely with the length of time the defendants exercised their claimed water rights without challenge by the United States.

It is the contention of the United States that, under the facts and circumstances of this case, it is not barred from the relief it seeks, either in whole or in part, by laches, estoppel, or any other recognized principle of equity.

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[10] The only "local laws" even remotely involved in this case are the Nevada laws dealing with appropriation. But neither the United States nor the defendants have raised any issue as to the construction of those laws.

[11] The supplementary opinion and conclusions of law of the District Court are fully stated, *supra*, pp. 13–15.

1. Laches

No principle is more firmly established than that the United States cannot, in a suit to assert a public interest, be barred by laches. As long ago as 1824 Justice Story, in *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735, said:

> The general principle is, that *laches* is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions.

In *United States* v. *Beebe,* 127 U. S. 338, 344, the Supreme Court said:

> The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt.

The Supreme Court used very similar language, quoted *infra,* pp. 41–43, in *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409, a suit by the United States to enjoin an illegal use of certain of its public lands. That laches is, generally speak-

ing, no defense to a suit by the United States to enforce a public right, see also *United States* v. *Nashville &c. Ry. Co.,* 118 U. S. 120, 125; *United States* v. *Insley,* 130 U. S. 263, 266; *Steele* v. *United States,* 113 U. S. 128, 134; *United States* v. *Dalles Military Road Co.,* 140 U. S. 599, 632; *United States* v. *Michigan,* 190 U. S. 379, 405; *United States* v. *Vanzandt,* 11 Wheat. 184, 187; *Gaussen* v. *United States,* 97 U. S. 584, 590; *Lindsey* v. *Miller,* 6 Peters 666, 672; *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427, 454 (S. D. Calif.).

If there is any exception to the principle that the United States cannot be barred by laches, it is limited to commercial transactions of the United States. See *Cooke* v. *United States,* 91 U. S. 389, 398; *United States* v. *Bank of the Metropolis,* 15 Peters 377, 392; *United States* v. *Barker,* 12 Wheat. 559, 561. "Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion." *Cooke* v. *United States, supra,* at 398. That the present suit is brought by the United States in its sovereign character is clear. See *United States* v. *Minnesota,* 270 U. S. 181, 194.

2. Estoppel

The Supreme Court, it is believed, has never held the United States estopped, despite the vast number of cases in which that contention has been

urged.[12] On the other hand, the Supreme Court has not declared that the United States can never be estopped. See *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *Wilber Nat. Bank* v. *United States,* 294 U. S. 120, 123–124. But regardless of whether estoppel can, under any circumstances, operate against the United States, the present case is largely disposed of by the numerous holdings of the Supreme Court that the United States cannot be estopped by unauthorized acts of its agents. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, and *Cramer* v. *United States,* 261 U. S. 219, are cases especially analogous to the present case.

Utah Power & Light Co. v. *United States, supra,* was a suit by the United States to enjoin power companies from using certain lands of the United States for works for the generation and distribution of electric power, and to recover compensation for past use. The power companies contended that certain statutes authorized their use of the lands. This contention was resolved against them by the court. The companies further contended that the United States was barred from challenging their

[12] Of the cases examined, that most closely resembling a holding of estoppel against the United States, although it does not use that term, and although the United States was not a party to the suit, is *Lindsey* v. *Hawes*, 2 Black. 554, 560. In *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289, however, that case was referred to as resting upon a construction of acts of Congress.

right to use the lands for their works: Government officials had not only "silently acquiesced" in the expenditure of huge sums for the power works on Government lands, but had entered into agreements consenting to the construction and operation of the works. Rejecting this contention, the court said (pp. 408–409):

> In their answers some of the defendants assert that when the forest reservations were created an understanding and agreement was had between the defendants, or their predecessors, and some unmentioned officers or agents of the United States to the effect that the reservations would not be an obstacle to the construction or operation of the works in question; that all rights essential thereto would be allowed and granted under the Act of 1905; that consistently with this understanding and agreement and relying thereon the defendants, or their predecessors, completed the works and proceeded with the generation and distribution of electric energy, and that in consequence the United States is estopped to question the right of the defendants to maintain and operate the works. Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Lee* v. *Munroe,* 7 Cranch 366; *Filor* v. *United States,* 9 Wall. 45, 49; *Hart* v. *United States,* 95 U. S. 316;

Pine River Logging Co. v. *United States,* 186 U. S. 279, 291.

As presenting another ground of estoppel it is said that the agents in the forestry service and other officers and employees of the Government, with knowledge of what the defendants were doing, not only did not object thereto but impliedly acquiesced therein until after the works were completed and put in operation. This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735; *Steele* v. *United States,* 113 U. S. 128, 134; *United States* v. *Beebe,* 127 U. S. 338, 344; *United States* v. *Insley,* 130 U. S. 263, 265–266; *United States* v. *Dalles Military Road Co.,* 140 U. S. 599, 632; *United States* v. *Michigan,* 190 U. S. 379, 405; *State ex rel. Lott* v. *Brewer,* 64 Alabama 287, 298; *State* v. *Brown,* 67 Illinois 435, 438; *Den* v. *Lunsford,* 20 N. Car. 407; *Humphrey* v. *Queen,* 2 Can. Exch. 386, 390; *Queen* v. *Black,* 6 Can. Exch. 236, 253. And, if it be assumed that the rule is subject to exceptions, we find nothing in the cases in hand which fairly can be said to take them out of it as heretofore understood and applied in this court. A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other re-

> spects from the ordinary private suit to regain the title to real property or to remove a cloud from it. *Causey* v. *United States,* 240 U. S. 399, 402.

Cramer v. *United States, supra,* was a suit by the United States to establish the title of individual Indians to certain lands. The defendant contended that the United States was estopped to claim the lands for the Indians because officials of the United States had in the past leased the lands from the defendant for the Indians (276 Fed. 78). As to this, the Supreme Court said (261 U. S. 219, 234):

> Neither is the Government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians with the implied consent of the Government had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the Government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the Government was, under the circumstances, unauthorized and could not bind the Government; much less could it deprive the Indians of their rights.

The *Cramer* case is authority not only that the United States cannot be estopped by unauthorized acts of its agents but, what is obvious, that its agents are not, generally speaking, authorized to affect

the title of Indians to property the United States has set aside for them. Additional authority to the same effect, upon both propositions, is afforded by *United States* v. *Morrison,* 203 Fed. 364 (C. C. Colo.), and by *United States* v. *Conrad Inv. Co.,* 156 Fed. 123 (C. C. Mont.), aff'd, 161 Fed. 829 (C. C. A. 9).

United States v. *Morrison, supra,* was a suit by the United States to enjoin an individual, who had purchased land in a former Indian reservation from the United States, from appropriating water for the irrigation of his land from an irrigation ditch which the United States had constructed for the benefit of Indian allottees. One of the defenses was "that the agent in charge of the Indians gave his consent, and that of the government, to the diversion of the water * * *." Rejecting this contention, the court said (203 Fed. 364, 365):

> However the fact may be on that point, it must be said that the government was not bound by anything said or done by the agent in its behalf.

United States v. *Conrad Inv. Co., supra,* was, like *Winters* v. *United States, supra,* a suit by the United States to enjoin the diversion, from a stream which constituted one boundary of an Indian reservation, of water needed for the domestic and irrigational needs of the reservation. The defendant contended in the District Court that the United States was estopped to challenge the de-

fendant's diversion of water, first because the Secretary of the Interior had approved the location of the defendant's canal (which traversed public lands), the plans of which revealed that the diversion now challenged would be made, and, second, because the defendant "having expended large sums of money in the construction of its canal, reservoir, and laterals, and many persons having settled in proximity thereto with a view to acquiring the use of water therefrom for irrigation and other purposes, the government ought not now to be heard to deny the rights which it encouraged the parties concerned to acquire at large expense." The Circuit Court rejected entirely the contention of estoppel. The Secretary's approval of the plan of the canal was, it held, merely a permit to cross the public lands, and not a permit to take waters.

> He has no power or authority to dispose of any of the waters of the public streams to private parties, nor can he bind the hands of the government by any acts of his looking to such a disposal. (156 Fed. 123, 131.)

The opinion continues (p. 132):

> Nor is the government estopped by the further circumstance of settlers acquiring rights in the project for irrigation purposes. The settlers must necessarily take with full knowledge of the law, and all they can obtain in that relation as against the government is what the laws of Congress have given them the right to acquire.

The issue of estoppel was apparently not raised in this Court. See 161 Fed. 829.[13]

Many of the "facts and circumstances" (summarized *supra*, pp. 5, 10–11) relied upon by the District Court in the case at bar as estopping the United States are strikingly like the facts which, in the cases just discussed, were held to be ineffectual to estop the United States. The *Utah Power & Light Co.* and *Morrison* cases are conclusive that the United States would not be estopped even if federal officials had affirmatively represented to the defendants that the waters of Walker River were open to appropriation, and the defendants, on the faith of these representations, had constructed their irrigation works. Plainly the United States is no more estopped by the mere silence of its agents. *United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123. And the application by the superintendent of the reservation to the State of Nevada for a permit to appropriate water, if it be regarded as an admission that there was no right to water without a permit, was, under the decision in the

[13] That the Government is not estopped by the mistaken assertion of facts or by the unauthorized acts of its agents, see, in addition to the cases cited in the quotation from *Utah Power & Light Co.* v. *United States*, *supra*, pp. 41–43, the following: *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 31; *Jeems Bayou Club* v. *United States*, 260 U. S. 561, 564; *Utah* v. *United States*, 284 U. S. 534, 545; *Wilber Nat. Bank* v. *United States*, 294 U. S. 120, 123; *Whiteside* v. *United States*, 93 U. S. 247, 257.

Cramer case, wholly unauthorized, and so could not bind the United States or the Indians.

Furthermore, the United States would not be estopped in this case even under the principles of estoppel which apply between individuals. In *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427 (S. D. Calif.), Judge Yankwich, in an elaborate opinion, recently said (p. 452):

> While acquiescence, delay (through lapse of time, limitations, or laches), or nonaction do not estop the government, the doctrine of estoppel may be asserted successfully against it when it or its agents, acting within the scope of their authority, have been guilty of acts which amount to fraud and which were acted on in good faith by others to their detriment.

As pointed out *supra,* there is no Supreme Court authority that the United States can ever be estopped. Assuming, however, that Judge Yankwich's statement of the law is correct, and assuming further, what has been shown not to be the case here, that the acts relied upon as estopping the United States were within the authority of its agents, yet the estoppel must fail for want of elements essential to an estoppel between individuals.

The opinion of Judge Yankwich, quoted above, continues (p. 452):

> All the conditions under which estoppel arises between individuals, i. e., (1) false representations or concealment of material

> facts, (2) made with knowledge to (3) a person without knowledge or means of knowledge, (4) with intention that they be acted upon, and (5) action thereon to one's prejudice * * *, or conditions tantamount to fraud actually acted upon * * *, must coexist when estoppel is invoked against the government.

In *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, the Supreme Court, speaking through Mr. Justice Field, similarly defined the elements of estoppel. It said (pp. 335–336):

> For the application of that doctrine [equitable estoppel] there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 Story's Eq. 391. To the same purport is the language of the adjudged cases.

Morris v. *Bean,* 146 Fed. 423 (C. C. Mont. 1906), aff'd. 221 U. S. 485, is also applicable. The plaintiff in that case, as here, owned lands on the lower part of a stream, and sought to enjoin diversions upstream. Defendants set up estoppel, laches, and other defenses. In holding for the plaintiff the circuit court said (pp. 434–435):

> It is safe to say that few cases of this character have been tried where the defense of estoppel has not been interposed with result uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not be allowed to do so, because they knew the defendants were building up their improvements, and relying upon the use of the water to maintain them. An all-sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it, the one side is as much estopped as the other.
>
> What is it that the appropriators in Wyoming have concealed which has misled the defendants to their prejudice? An estoppel of this character is based upon fraud—the inequity of asserting a right after having by silence misled a party by concealing facts which were unknown to him. Here they were equally known to both parties, hence the case does not present elements upon which an estoppel can be founded * * *.

> There is no principle of estoppel which can aid the defendants, nor can they invoke the doctrine of laches.

The application of these well established principles to the "facts and circumstances" relied upon in the instant case leads inevitably to the conclusion that this case is not within any recognized doctrine of estoppel.

Many of the facts upon which the defendants posit estoppel have to do with the delay of the United States in bringing suit. Others deal with the "acquiescence" of the United States while the defendants appropriated water and expended large sums in the construction of irrigation works in reliance upon their water rights. "No estoppel arises from mere delay, acquiescence, or nonaction, even if it results in inducing expenditures." *United States* v. *Standard Oil Company of California,* 20 F. Supp. 427, 454. Accord: *City of Mobile* v. *Sullivan Timber Co.,* 129 Fed. 298 (C. C. A. 5).

The facts relied upon, other than those falling within the categories of delay and acquiescence, may be classified as (1) sale of lands to the defendants, (2) application by the superintendent of the reservation for a permit to appropriate water, and (3) the recommendation that a dam be built for the reservation. None of these facts, it is submitted, show the "intended deception" or "such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his in-

jury," which is an essential ingredient of laches (*Brant* v. *Virginia Coal & Iron Co., supra,* 93 U. S. 326, 335).

(1) The District Court found that the government officials knew (R. 398), and the Master found that they knew or should have known (R. 270), when they sold lands in the Walker River basin to the defendants or their predecessors, that the lands were valueless unless irrigated, and that they could be irrigated only from the Walker River. The Master further found (R. 271) that—

> On the other hand, it was quite patent to the white settlers that the reservation had been set aside, that several hundred Indians were living thereon, and that the government was gradually bringing the lands of the reservation under cultivation for the use of the Indians by use of water diverted from Walker River.

These facts do not bar the United States from asserting the rights of the Indians in the water of Walker River. No estoppel can arise where the means of knowledge are available to both sides. *United States* v. *Standard Oil Company of California, supra; Brant* v. *Virginia Coal & Iron Co., supra; Morris* v. *Bean, supra; Commercial Inv. Trust* v. *Bay City Bank,* 62 F. (2d) 735, 736 (C. C. A. 6, 1933); *Lancashire Shipping Co.* v. *Elting,* 70 F. (2d) 699, 701 (C. C. A. 2, 1934). Furthermore, it is absurd, in view of the immense

extent of the public domain and of the nominal prices at which it was sold, to indulge the fiction that the United States knew that a particular tract was arid, and could be irrigated only from a particular stream.[14] It was for the settlers to determine whether the land they chose was suitable for their needs.

(2) In 1910 the superintendent of the reservation filed in the office of the State Engineer of Nevada an application, on behalf of the Indians of the reservation, to appropriate certain quantities of the water of Walker River (R. 822). A permit was granted (R. 823), but was cancelled in 1921 for failure "to comply with conditions of permit" (R. 824). The Master (R. 403) and the District Court in its findings of fact (R. 498) referred to this as reliance by the United States upon the doctrine of appropriation. If the application is to be regarded as an admission that the Indians had no water rights, it was, as has been shown, wholly beyond the authority of the superintendent, and so could not bind the United States or the Indians. See *supra,* pp. 43–44, 46–47; also R. 966–967. But, in any event, there is no suggestion that the defendants relied upon the application or even knew of it.

[14] "But, as this court has said, the government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value." *Causey* v. *United States*, 240 U. S. 399, 402. See also *United States* v. *Standard Oil Company of California*, 20 F. Supp. 427, 453.

(3) In 1926 Congress appropriated money for a reconnaissance to determine to what extent the water supply of Walker River might be augmented, the feasibility of reservoir sites, the costs of rights-of-way, etc. (Act of June 30, 1926, 44 Stat. 779). A report was made to the Commissioner of Indian Affairs by a supervising engineer recommending, among other things—

> That a storage reservoir be created for the Indian land of Walker River Indian Reservation by the construction of a dam at the Rio Vista site, and that the irrigation system be extended to cover the entire irrigable area of the reservation. (R. 499.)

There is nothing in the record indicating that the report has ever been approved by the Indian Bureau, by the Secretary of the Interior, or by Congress. However, from the report the District Court concluded (R. 402) that "The Government's water problem at the reservation might be solved by accepting and acting upon the recommendations of its engineers." Whether the water problem of the United States "might be solved" by the building of a reservoir was not for the District Court to decide, but for Congress to consider, and its action or nonaction is no basis for an estoppel. A similar contention was rejected in *United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123. The opinion of the Circuit Court reads (p. 131):

> It is argued by counsel for defendant that water can be brought over from Badger

> creek, a stream located 13 or 14 miles north of Birch creek, for irrigation of all the Birch creek lands. This, however, is a project of doubtful utility; but conceding that it could be successfully carried out, the government is not required to do so, when the waters of the latter stream are much more available, and are as much subject to use upon the reservation as those of Badger creek. The suggestion is clearly one of expediency, of which the Interior Department ought to be the sole judge, as it is a matter for its initiative, acting in its administrative capacity, in determining the occasion and the needs of the government pertaining to the waters flowing in the stream along and upon the reservation.

Finally, the instant case has a special aspect which would in any event prevent the operation of an estoppel. It is hornbook law that the relationship between the Government and Indians is that of guardian and ward. *United States* v. *Kagama,* 118 U. S. 375, 382–384; *Cramer* v. *United States,* 261 U. S. 219, 232; *United States* v. *Payne,* 264 U. S. 446, 448. A ward is not estopped by the acts of its guardian. *Telegraph Co.* v. *Davenport,* 97 U. S. 369, 373; *Harmon* v. *Smith,* 38 Fed. 482, 486 (C. C. Minn.). In *Hammons* v. *National Surety Co.,* 36 Ariz. 459, 469; 287 Pac. 292, 295, the court said:

> We are of the opinion that a guardian cannot on behalf of his ward waive any sub-

> stantive right of the ward or by his conduct estop the ward from recovering what is due the latter.

This rule has received wide application in state jurisdictions.[15] Especially pertinent here is *Shamleffer* v. *Peerless Mill Company,* 18 Kan. 24, holding that the conduct of a guardian in permitting a lower riparian owner to divert water from a stream did not estop the ward from asserting her right to the flow of the entire stream in its natural channel. The court said (p. 32):

> There is no pretense that she [the ward] knew anything of the work, or any claim that her conduct worked any estoppel, if indeed the knowledge and silence of an infant can ever be construed into an estoppel. And as to the knowledge and silence of her executor and guardian, that certainly can work no estoppel as against her.

Thus, even if the facts of this case otherwise satisfied the requirements for an estoppel, there could still be no estoppel because of the wardship status of the Indians.

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[15] In *Levant State Bank* v. *Shults*, 142 Kan. 318, 47 P. (2d) 80, 82, it was said: "No default or silence of his [the guardian] can be used to bar them [the wards] of their rights." Accord: *Headley* v. *Hoopengarner*, 60 W. Va. 626, 55 S. E. 744, 751; *Reynolds* v. *Garber-Buick Co.*, 183 Mich. 157, 149 N. W. 985, 988; *Burnham* v. *Porter*, 24 N. H. 570, 580; *Draper* v. *Clayton*, 87 Neb. 443, 127 N. W. 369, 372.

3. Equitable rules

As we have seen, the Master expressed the view that, although the United States was not estopped to assert the implied reservation of water for the Indians in 1859, it would be inequitable to allocate to the United States water for the irrigation of any land in excess of 2,100 acres, the amount of land already under irrigation, since the Indians did not desire the irrigation of additional lands (R. 275). The Master accordingly recommended that the United States be given a right to 26.25 cubic feet of water per second, for the irrigation of 2,100 acres of land of the reservation, with a priority of November 29, 1859 (R. 310–311).

It is, of course, true that the United States is, generally speaking, subject, as a suitor, to the principles of equity. See *Brent* v. *Bank of Washington,* 10 Peters 569, 614. This rule is, however, subject to exceptions. Laches and estoppel, both doctrines of equity, apply to the United States only to a limited extent, if at all. Nor does the rule mean, as the Master apparently thought, that the legal rights of the United States are to be determined upon general notions of fairness; the United States is subject to *principles* of equity as is an ordinary litigant, but cases are not to be decided against it upon amorphous concepts of justice without regard to precedent or established principles. Nor will equitable principles be applied against the United States "to frustrate the purpose of its

laws or to thwart public policy." *Pan American Co.* v. *United States,* 273 U. S. 456, 506.[16] See also *Causey* v. *United States,* 240 U. S. 399, 402; *Heckman* v. *United States,* 224 U. S. 413, 446–447.

When the Walker River Indian Reservation was created there was impliedly reserved for the Indians water sufficient for the irrigation of all of the irrigable lands of the reservation. No principle of equity would justify permanently depriving the Indians of all of the water reserved for them in excess of the amount they are now using. And if there were any such principle it would, so applied, plainly "frustrate the purpose" of the laws of the United States and would "thwart public policy."

In *United States* v. *Conrad Inv. Co., supra,* 156 Fed. 123 (aff'd by this Court, 161 Fed. 829), the Circuit Court observed that the Government, as guardian of the Indians, had a most important trust to perform.

> * * * that is, so to conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future needs, when they have ultimately secured their allotments in severalty. What

[16] In that case the Supreme Court held that the United States need not, in a suit to cancel contracts for fraud, tender compensation to the defendant for services accepted by the United States under the contract. Similarly in *Heckman* v. *United States*, 224 U. S. 413, that court held that the United States need not, in a suit to set aside sales of restricted Indian lands, tender back the purchase prices.

> these needs will be cannot be definitely determined. For the present, the matter is administrative in its detail. These Indians are now but the wards of the government. As it pertains to the lands which the government is holding in trust for them, it is administering them for their proper use and benefit, and in its administrative capacity it ought to be the judge of what amount of the waters of the streams adjacent to the reservation is or will eventually be essential for the needs of the Indians for use in connection with their lands. (P. 129.)

The evidence in that case disclosed that some eight or ten thousand acres of land of the reservation were irrigable, but that only a small part of that acreage was irrigated by the Indians. The Circuit Court, accordingly, allowed a certain quantity of water based upon the present needs of the Indians, and concluded (p. 132):

> * * * the government will have leave to apply for a modification of this decree at any time that it may determine that its needs will be in excess of the amount of water so designated.

The decree of the trial court was affirmed by this Court (*Conrad Inv. Co.* v. *United States,* 161 Fed. 829). This Court said (p. 832):

> The lands within these reservations are dry and arid and require the diversion of waters from the streams to make them productive and suitable for agricultural, stock raising,

> and domestic purposes. What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case.

And the opinion of this Court concludes (p. 835):

> It is further objected that the decree of the circuit court provides that whenever the needs and requirements of the complainant for the use of the waters of Birch creek for irrigating and other useful purposes upon the reservation exceed the amount of water reserved by the decree for that purpose, the complainant may apply to the court for a modification of the decree. This is entirely in accord with complainant's rights as adjudged by the decree. Having determined that the Indians on the reservation have a paramount right to the waters of Birch creek, it follows that the permission given to the defendant to have the excess over the amount of water specified in the decree should be subject to modification, should the conditions on the reservation at any time require such modification.

What the future needs of the Indians in the present case will be cannot be now determined. They are entitled to have their prior right to 150 cubic

feet per second of the water of the river (that is, water sufficient for the irrigation of all of the irrigable lands of the reservation) recognized in this proceeding, as sought in the amended complaint (R. 17). On the other hand, the Government does not wish absolutely to deprive the defendants of water which the Indians do not need at the present time, and which they may never need. A decree like that approved by this court in the *Conrad Inv. Co.* case is a possible solution. Such a decree would, however, be open to the objection, both from the standpoint of the district court and of the United States, that a modification of the decree would be necessary every time a few additional acres on the reservation were brought under irrigation. Nor would such a decree secure to the defendants the benefit of any reduction in the amount of water used by the Indians, due to temporary abandonment, permitting tracts to lie fallow in crop rotation, etc. A preferable solution, it is believed, is a decree adjudging that the United States has the right to divert water from the Walker River up to a maximum of 150 cubic feet per second, with a priority of November 29, 1859, for the irrigation of 10,000 acres of land of the reservation, and providing that the United States shall inform the water master appointed by the court, prior to the commencement of each irrigation season, of the amount of water which will be needed for the reservation that season, up to the

maximum amount of water decreed to it. Under a retention of jurisdiction clause such as is now included in the decree (R. 535), any defendant aggrieved or injured by an act or omission of the water master could apply to the court for relief.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decree of the district court should be reversed.

CHARLES E. COLLETT,
Acting Assistant Attorney General,
ROY W. STODDARD,
Special Assistant to the Attorney General,
OSCAR A. PROVOST,
THOMAS HARRIS,
CLIFFORD E. FIX,
Attorneys, Department of Justice,
Washington, D. C.

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No. 8779

In the

United States Circuit Court of Appeals

for the 7

Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, et al., APPELLEES

BRIEF FOR APPELLEES

WILLIAM M. KEARNEY,

EDWARD F. LUNSFORD,

MYRON R. ADAMS,

GEORGE L. SANFORD,

WILLIAM H. METSON,

ROBERT TAYLOR ADAMS,

Attorneys and Solicitors for Appellees.

RENO PRINTING CO. 129-131 N. CENTER ST.

Subject Index and Outline

Citations

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UNITED STATES OF AMERICA, APPELLANT

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WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, et al., APPELLEES

BRIEF FOR APPELLEES

This is an appeal from a final decree of the District Court of the United States, for the District of Nevada, entered on April 14, 1936 (R.521).

The Appellees are of the opinion that preliminary matters are properly stated by Appellant and so they adopt that part of Appellant's Brief, pages 1 to 3 ending with the heading "Statement".

An outline of Appellees' argument is to be found in the Subject Index and Outline, therefore Appellees will not re-summarize their Argument.

Throughout this Brief numbers in parentheses indicate page references to the "Transcript of the Record" on file herein. Also, unless otherwise indicated, all italics are supplied by writer. Page references to United States Supreme Court opinions are, unless otherwise indicated, to the United States Reports. References to State Supreme Court opinions are to pages of the National Reporter System.

The Appellees have discussed many of the cases cited by the Appellant in their Argument, herein. A discussion of the remaining cases will be found in Appendix A.

The Appellees in Appendix B consider the unreported cases referred to in Appellant's Brief, pages 23, 29-30.

The Appellees in Appendix C set out a statement by Harold L. Ickes, Secretary of the Interior, with regard to the completion of a storage reservoir for the Indians of the Walker River Indian Reservation.

STATEMENT OF THE CASE

The Appellees accept that part of the Statement by Appellant beginning on page 3 and ending with the words "In summary the evidence showed:" on page 6. Appellees do not agree with the purported summary of the evidence beginning on page 6 and ending with page 15. We believe that we may most clearly present our view of the material facts of the case by setting forth a complete statement of the evidence. To some extent this statement or summary of the evidence will be the same as Appellant's statement. The portion of Appellant's statement unchanged by Appellees' additions, changes and corrections will be italicised.

The Walker River is non-navigable. It rises in California, but its main course lies in Nevada, and it empties into Walker Lake in that State (R. 378, 389, 494-496). It consists of two main branches East and West Walker, which are fed by many small streams rising high on the eastern slopes of the Sierra Nevada Mountains in Mono and Alpine Counties, California The mountains at the source of these streams are sparsely forested and afford little protection for the snows, resulting in a rapid runoff of the water on the advent of the warm spring days (R. 387-388, 682). The distance from the source of the two main branches of the Walker River to the reservation is great (R. 251, 388), and in Nevada the streams flow through wide,

sandy and gravelly beds for many miles (R. 691, 790), resulting in large losses of the water through evaporation and seepage (R. 388). From the source of the East Walker to its junction with the West Walker, the distance is approximately seventy miles. From the source of the West Walker to the junction is approximately sixty-seven miles, and from the junction through Mason Valley and to the point of diversion on the reservation the distance is approximately thirty-five miles, and from the latter point to Walker Lake, approximately twelve miles (R. 251, 294,388-389). The peak of the flow usually occurs in May or June, and thereafter the water subsides rapidly, so that in most recent years the flow by the middle of July is insufficient (R. 251, 389, 627-628, 633, 641, 681, 708, 789, 791, 810, 961-962), without storage facilities (R. 251, 294, 389, 791, 792), to meet the requirements of the lands along the river which have been brought under cultivation (R. 294, 389, 813). There is considerable return flow into the river from the water diverted for the irrigation of Bridgeport, Antelope, Smith and Mason valleys, which augments the flow to the Indian reservation in the latter part of the irrigation season (R. 252, 389, 641-642, 644, 707, 721-722, 791, 811, 816, 860). Storage of water in present reservoirs of the Appellees, hereinafter referred to, prevents water going to waste in the winter months and has a tendency to reduce the losses and increase the flow available to the reservation during July, August and September (R. 633, 707, 709, 800, 869).

Bridgeport, the county seat of Mono county, California, is situated on the East Walker in Bridgeport Meadows. It has a population of about six hundred (R. 390). The principal town in the water shed of the main Walker River is Yerington, the county seat of Lyon county, Nevada, having a population, at the time the action was tried, of approximately eight hundred (R. 252-253, 390). On the tributaries of the river and on the main river the aggregate population of the district which embraces the lands claiming rights to the use of the water of Walker River, exclusive of Indians, is approximately three

thousand (R. 390, 777). The region of the Walker River and its tributaries is arid and incapable of producing crops without artificial irrigation, and the river and its tributaries are the only source of water supply for the irrigation of the lands of the parties to this suit (R. 390, 626, 682). The inhabitants of the Walker River Basin are dependent upon agriculture and stockraising, which in turn are dependent upon the supply of water and availability of the use of the water of the Walker River (R. 863-684, 710). By reason of the low precipitation, the lands would be dry and arid and of little value without irrigation (R. 390, 252-253). The estimated annual value of the crops of hay, grain and vegetables produced upon the lands of the Appellees in this suit, together with the value of the stock and fowl raised thereon amounts to approximately $1,750,000 (R. 253, 390, 780), and the assessed valuation of the lands in the Walker River irrigation district, exclusive of the lands of the government, is approximately $4,000,000 (R. 253, 390, 781) the actual value being 30% more (R. 781). Bridgeport valley assessed valuation is $1,300,000 (R. 817).

The irrigated areas, exclusive of the reservation lands, are approximately as follows: Bridgeport Meadows, 20,000 acres; narrow valleys on East Walker, 16,000 acres; Antelope Valley, 12,000 acres; Smith Valley, 15,000 acres; Mason Valley, 48,000 acres (R. 253, 390, 625, 778-779).

There are two reservoirs constructed by the Appellee, Walker River Irrigation District, for the purpose of conserving and saving the flood and winter flow of the Walker River, namely, the Bridgeport Reservoir situated on the East Walker River just below the Town of Bridgeport, having a present capacity of forty-two thousand acre feet (R. 253, 391, 625), and Topaz Reservoir situated near the West Walker River just below Antelope Valley, having a capacity of fifty thousand acre feet (R. 253, 391, 625-626, 778). There are also several smaller reservoirs situated on the east and west forks of said river. Most of the Appellees have rights in some one of these reservoirs. (R. 254, 391).

Even under natural conditions, that is, in the absence of upstream diversions, no water would in some years reach the lands of the Walker River Indian Reservation by the end of July by reason of seepage and high evaporation loss occurring with the streams in a depleted condition at their source (R. 252, 294, 389, 628, 635-636, 735-736, 810). Estimates show that the loss in transit between the lower end of Mason Valley to the diversion point on the Reservation when the flow has diminished to ten or twelve second feet, would be 100% (R. 252, 389).

It was shown that by reason of the heavy evaporation and seepage losses in the lower reaches of the river, the irrigation of every additional acre of land on the reservation would require water sufficient to irrigate two acres of the land upstream, and that the white settlers would be deprived of water to that extent, at least during the latter part of the irrigation season, and the upstream valleys would be dried up and revert to their natural condition. (R. 271, 703-704, 709, 715-716, 719-720). It was also shown that from the point of diversion of the government canals to the point of application of the water to the land, the loss by evaporation and seepage was 33% (R. 271, 390, 617, 627, 637, 653, 955). There is testimony that it is not economically feasible to irrigate more than 3000 acres of land upon the reservation because of the lack of water in the latter part of the irrigation season (R. 271, 684-685, 717-718, 739, 812-813, 818). *

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*The Appellant, in its brief, page 15, under the heading, Specification of Errors to be Urged, waives assignment of Error No. 2. This Assignment reads as follows (R. 541): "The court erred in making and entering that portion of its finding No. II, finding that even under natural conditions, that is, without upstream diversions, the water would not, in some years of low flow, reach the lands of the Reservation by the end of July by reason of seepage and high evaporation loss." By waiving this Assignment of Error the Appellant has admitted the facts set out in the finding of facts, and that the evidence supports such a finding. We must take issue with the Appellant that this Assignment is not pertinent to the legal issues involved. A court of equity should not grant the relief sought by the Appellant if it will turn 111,000 acres of land back to desert and destroy values of $4,000,000 worth of land and make 3000 white settlers dependents, while no value would accrue to the 520 Indians living on said Reservation. A court of equity will not enter such a decree.

Antioch v. Williams Irr. Dist., 188 Cal. 451, 461, 205 Pac. 688.

Originally the Walker River Indian Reservation included the Walker Lake, the land around it, and that along each side of the river for a distance of thirty miles above the lake. It now contains approximately 86,400 acres of land, of which about 2,100 acres are now under irrigation (R. 246, 496, 627).

(The Appellants' contention that there were 10,000 acres of irrigable land ((Brief pp. 6 and 7)) is met by evidence introduced by both parties that there were not that many irrigable acres ((See R. 593, 671, 757, 759, 764, 965-966, 972)). For example, two reports of the Indian officers of the United States government in charge of the Walker River Reservation show there are only approximately 3000 acres of irrigable land on the reservation ((R. 757-758)). The Appellant in making this statement only refers to the Amended Complaint, referred to by the special master ((R. 246)), and the testimony of Appellant's witness, E. W. Kronquist (R. 627)). It will be noted that the District Court in its decision and its findings of fact made no such statement ((R. 496) and that Appellant's assignment of error IX ((R. 45)) is based on the failure of the lower court to find and decree that said reservation included 10,000 acres of irrigable land susceptible to irrigation.)

In 1859 *the lands now included in Nevada were a part of Utah Territory.* The lands included in California were a part of the State of California which the Court will judicially know was taken into the Union in 1850 on an equality with the thirteen original states (9 Stat. at L. 452). *On November* 25, 1859 *the United States Indian Agent for that Territory wrote the Commissioner of Indian Affairs that there was a general "stampede" of persons from California to the mining localities within the agency, which led to the immediate necessity of reserving "a sufficient portion of their lands to enable them to sustain life."* (*R.* 569). *He recommended that part of the Truckee River Valley* (*now the Pyramid Lake Indian Reservation*), *and part of the Walker River Valley* (*now the Walker Lake Indian Reservation*), *be reserved for the Indians, the boundaries of the suggested reservation being indicated on an*

attached map (*R.* 570). The agent continues in his letter to say that these were "isolated spots, embracing large fisheries, surrounded by mountains and deserts, and will have the advantage being their home from choice." He speaks about the Indians being driven to seek a "refuge in crime" and sincerely hopes that the "asylums" will be provided for them so that they will be free from the influence of "White Brigands" who are using them as instruments to rob and plunder the citizens (R. 570). *On November* 26, 1859, *the Commissioner of Indian Affairs wrote the Secretary of the Interior inviting the latter's attention to the agent's letter and stating that although but a small portion of the land in the proposed reservations is "suited for agricultural purposes, yet it is believed that it will be sufficient for the sustenance of the Washoe and Pahute Tribes of Indians, in connection with the fish which they may obtain from Pyramid and Walker Lakes."* The Commissioner suggests that this subject be laid before the President for his consideration, with a recommendation that the tracts of country indicated on the map may be set aside for the Indians' use. (R. 571). *On November* 29, 1859, *the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office requesting him to direct the Surveyor General of Utah Territory to respect the reservation of these tracts of land, as indicated upon an attached map, when the public surveys should be extended over that portion of the territory, and requested that in the meantime the proper local Land Offices be instructed to respect the reservation on the books of their offices,* when such offices shall have been established (R. 572). *The Commissioner of the General Land Office, on December* 8, 1859, *instructed the Surveyor General at Salt Lake City to reserve for Indian purposes the tracts of land in question by* proper annotations upon the corrected map of the Utah Surveying District (R. 573). By August 29, 1860, some steps had been taken to prevent trespassing upon the lands in question (R. 577), and by June 27, 1865, their boundaries were surveyed (R. 578-581, 595, 596). *On March* 19, 1874, *President Grant ordered that the reservation on Walker River, as surveyed, be withdrawn*

from sale or other disposition, and set apart for the Pahute Indians residing thereon (R. 580-581).

In 1859 the Pahutes were at war with the whites and were so at war for some time subsequent thereto (R. 396-398, 574, 575, 576, 585-586, 592, 602, 603, 737, 754, 770-772, 773, 831). The exhibits show that the whites, for many years after 1859 found they had to give the Indians presents to keep them peaceable (R. 587, 589-599, 602, 742-745, 761).

The Appellees deny the statements made in the first two sentences on page 9 of Appellant's brief. The pages of the record referred to by Appellant's brief develop the following facts:

A letter of August 13, 1861, submits a budget for the expenses of the office of the Indian Agent of the Pyramid Lake and Walker River Reservations, for the next year, of $18,000, covering among other things, ox teams, mules, cows, sheep and necessary farming instruments and seed. The agent stresses the fact that by making the appropriation the Indians in five years could be made self-sustaining and that this would insure peace. (R. 587). Other recommendations were made that the Indians be taught how to farm and farming instruments and stock should be given to them (591, 592, 599). In 1865 the Indian agent stated he was paying wages for Indians to work upon the reservation (R. 591). At a conference held with certain Indian chiefs in 1861, Governor Nye found they reacted favorably to a suggestion that if the Government gave them livestock and farming implements they would work as the local agent should direct (R. 599). The above is all the evidence that the United States and the Indians desired, from the time the reservation was created, that the Indians should support themselves by agriculture (Br. 9). The fact is that in all the years since the reservation was established ouly a very few Indians have at any time wished to support themselves by farming (R. 399).

In 1865 letters written by Indian agents show that they had not been furnished with equipment and means to cultivate the

lands of the Walker River Reservation and that the upstream white settlers were objecting to the lands of the reservation being allowed to lie idle (R. 592, 755-756). In 1866 the Indian agents reported that some three acres of the Indian reservation lands had been plowed and potatoes, corn, and beans planted; that the work had been done by the agent; and that although the Indians had expressed interest in the cultivation he was obliged to decline their assistance as there were neither provisions to feed them nor tools for them to work with (R. 759). As late as 1869 the Superintendent of Indian Affairs found there was no evidence of any attempt to render these reservations habitable nor to develop their agricultural resources. (R. 763). In 1871 the same Superintendent of Indian Affairs stated he would open up an irrigation district and would place some land under cultivation (R. 764). It would appear that the first attempt at ditch construction took place in 1868 (R. 963). A son of a former Indian Service employee on the Walker River Reservation testified that in 1876 there was very little land, that is, only 50 acres, under cultivation and that there were no Indians on the reservation in 1876. Also that there were no agricultural implements, except a few shovels. (R. 806-807). In fact, the principal food of the Indians at the time of the creation of the reservation, and for many years thereafter, was fish, roots, pine nuts, nut grass and game. The reservation was, in fact, chosen for these natural supplies of sustenance for the Indians (R. 588, 592, 595, 605, 651, 758).

During the subsequent years since the establishment of the reservation the government has taken some steps to encourage and teach the Indians to practice farming and irrigation, and furnished them with some seeds and implements for farming (R. 258, 587, 588, 591, 593-594, 599, 648-651, 671-674). However, very little farming was done and the crops were very meager (see last referred to pages of the record).

The Indians are poor farmers; they farm very uneconomically; they won't or can't rotate the use of water; and they

will not irrigate at night (R. 295, 631, 662, 663-4, 811, 950). The Indians, from the beginning, would rather work for wages on the upstream points than farm for themselves (R. 591, 808, 821).

In 1872 the United States commenced the construction of ditches and dams for the purpose of putting water on land, not subject to overflow, for the use of the reservation (R. 673-674). From time to time the United States enlarged and extended the irrigation ditches upon the reservation until there are now two canals thereon having a combined length of 17 miles, and there are lateral ditches having a combined length of 13 miles (R. 434, 496). *And a combined capacity of 115 cubic feet per second. These canals and laterals are capable of irrigating* 3,600 *acres without further extension* (R. 614). *On the* 2100 *acres under irrigation, the Indians produce valuable crops of alfalfa, grain, and vegetables, and raise fowl and livestock, a small part of which they sell* (R. 434, 617, 665). *There are approximately* 500 *Indians on the reservation* (R. 275, 496). *Ninety-six individual Indians are farming parts of* 140 *allotments of* 20 *acres each, and* 96 *allotments have homes on them* (R. 434, 496). *Five hundred and four allotments have been made to date* (R. 656). Some 50% of these have become "dead allotments" (R. 641, 656).

The lands of the defendants are situated in the Walker River basin above the reservation. They were acquired and purchased from the United States under acts of Congress by the white settlers, the earliest title originating shortly after 1859, and the water of the Walker River was applied to beneficial use upon said lands by successive appropriations, *the earliest appropriation being in* 1860 (R. 497), *until all the water had been fully appropriated* (R. 270, 271, 398). In order to supplement the supply for irrigation purposes, the settlers, through the Appellee, Walker River Irrigation District, constructed in 1922 Topaz Lake Reservoir, having a capacity of approximately fifty thousand acre feet, and in 1924-1925 Bridgeport Reservoir, having a capacity of approximately

forty-two thousand acre feet, and is storing therein the winter or flood waters of the river (R. 497). The aggregate cost of these two reservoirs was over eight hundred thousand dollars (R. 497, 778). Other smaller reservoirs were built and are maintained by the white settlers for the same purpose (R. 253-254). The irrigation ditches owned by Appellees have cost over one hundred thousand dollars (R. 811). *No objection was made by the United Staes of America to the appropriation of water by the white settlers or their ocnstruction of expensive irrigation works, and no proceedings were taken* to determine the rights, if any, of the United States as against the white settlers along said river until the commencement of this suit (R. 497-498), notwithstanding the United States of America was given an opportunity to become a party to the suit in the Federal Court below, entitled "Pacific LivestockCompany, a corporation, plaintiff, vs. T. B. Rickey, et al, defendants," No. 731 (Exhibit 16, R. 784-786) (hereinafter referred to as suit No. 731), which suit was brought for the purpose of determining all of the water rights in and to the waters of Walker River and its tributaries, commenced in 1904 and decided in 1919, and was invited to file its pleadings in said suit as stipulated to by nearly all the parties thereto under date of May, 1907. The Master in that suit found that the United States had appropriated from the Walker River 22.93 cubic feet of water per second, with dates of priority of 1868, 1872, 1875, 1883, and 1886, and had irrigated thereby 1,905.55 acres of land of the reservation (R. 387, 437, 499, 786). The decree did not make any provision for the rights of the United States (R. 786).

The Appellant has, and as late as 1910 did, rely upon the doctrine of appropriation for its rights, in which year the superintendent of the Reservation, on behalf of the Indians, made application to appropriate public waters of the State of Nevada. (R. 436, 498, 821, 822, 830). The permit was granted but later cancelled because of failure of the applicant to comply with the provisions of the permit (R. 824).

However, it was stipulated that the amount of land irrigated by the appellant and the Indians on the Walker River Indian Reservation, by actual diversion, could be found by the Master as set out in the Master's report in suit No. 731 (R. 675).

In 1926, *Congress* (*Act of June* 30, 1926, 44 *Stat.* 779) *authorized a reconnaissance to determine the feasibility of constructing a dam on the Walker River to augment the water supply for the Walker River Indian Reservation* (R. 339, 436, 498). Pursuant to this authorization, a comprehensive report, known as the Blomgren report, was made December 26, 1926. (R. 436). The Blomgren report is referred to in the lower court's opinion, and pertinent matters pertaining to the issues of this case are cited therefrom (R. 399, 400, 401). Among other things, the following appears in that report: that the normal flow would only be sufficient for 4000 acres of Indian lands (R. 634, 640); that even if there were no upstream irrigation there would only be enough natural flow for 10,000 acres of Indian lands one year in two (R. 638-639); that Indians will never cultivate more than 4000 acres (R. 640); and that a storage reservoir be created for the Indian land of Walker River Indian Reservation by the construction of a dam at the Rio Vista site, and that the irrigation system be extended to cover the entire irrigable area of the Reservation (R. 437); that such a reservoir would result in the conservation of the general water supply of the entire river and result in a utilization of the return and seepage flow; and would furnish the Indians with an adequate water supply for 10,000 acres of land (R. 708, 812, 818-819, 859-860, 913-914, 950, 962-963, 965, 966, 971). *It does not appear from the record that any action was taken on this report.* *

The Special Master filed his report (R. 244) *recommending findings of fact and conclusions of law* (R. 291) *and a decree*

*Since the case was tried and the evidence closed a reservoir has been constructed by the Appellant with a capacity of 8,000 acre feet for the irrigation of the Walker River Reservation lands and to catch flood waters that otherwise are wasted in Walker Lake. Certainly the Appellant will not deny this fact. (See Appendix C).

(R. 317). *The report of the Master expressed the view that when the United States created the reservation in* 1859 *it impliedly reserved water of the Walker River for the irrigation of reservation lands* (R. 261-270); that as the United States was acting in a governmental capacity it *was not estopped by the failure of its officials to inform purchasers of land in the Walker River Valley of its right to the use of sufficient water in the river for the irrigation of the irrigable lands of the reservation or by reason of the delay of its officials in taking legal steps to enforce its claims* (R. 271-274); that, however, since the Government came into a court of equity to establish its rights, it is bound by equitable rules, and that it would be inequitable to allocate the United States water to the detriment of the upstream settlers for the irrigation of 10,000 acres of land, when it appeared that during the entire period since the creation of the reservation only 2100 acres of land thereof have been brought under irrigation; that there are only about 500 Indians on the reservation and that the number is not increasing; and that there was no showing that there was a substantial demand by other Indians (R. 275).

The Master concluded, accordingly, that the United States should be granted a right to 26.25 *feet of water per second, for the irrigation of* 2,100 *acres of land, with a priority of* 1859 (R. 275, 323).

Both the United States and the defendants filed exceptions to the Master's report and proposed findings, conclusions, and decree (R. 335-360), *the United States contending that it had a right to the use of* 150 *cubic feet of water per second for the irrigation of the* 10,000 *acres of irrigable lands in the reservation, and that this right was not barred by any possible equitable defense* (R. 335-342).

On June 6, 1935, *the District Court filed its opinion* (R. 384, 11 F. Supp. 158). *The District Court held that neither the claim of the United States to* 150 *cubic feet of water per second nor the proposed decree of the Master awarding to it* 26.25 *cubic feet with a priority of* 1859 *could be sustained*

(R. 409-410). *It held that the United States did not impliedly reserve any water by the creation of the reservation; that the rights of the United States were, therefore, to be adjudged under the doctrine of appropriation as established by the State of Nevada* (R. 410); and that the silent acquiescence of the Government, along with other actions and circumstances, to the diversion of water by the white settlers amounted to an administrative construction of the local laws then in force. *The Court referred the case back to the Master to take further evidence upon one point, and directed him to prepare and submit findings of fact and conclusions of law consistent with its decision* (R. 427-428).

The Master again filed recommended findings of fact, conclusions of law, and a decree (R. 430, 458). *After argument on exceptions filed by the United States and by some of the defendants* (R. 474-490), *the District Court, on March* 21, 1936, *filed a supplementary opinion* (R. 492, 14F. Supp. 10). *This opinion, after stating that the United States contended that there was an implied reservation of water, declares* (R. 492):

> "Even if a reservation of water may be implied in the executive order, however the Indian rights may be defined or labeled in this instance, this court is of the opinion that the facts and circumstances have placed the white settlers in an inexpugnable position. Briefly, the facts, as dis-(531) closed by the evidence and narrated in this court's opinion in 11 Fed. Supp. 158, show that after the establishment of the Reservation in 1859 (then and thereafter the Indians being at war with the whites), commencing 1860 the whites acquired title from the United States to lands above the Indian Reservation, bordering on and adjacent to the Walker River and its tributaries; that they also acquired water by prior appropriation for a beneficial use, and actually irrigated and reclaimed such lands; that they have enjoyed undisputed and undisturbed possession of such lands and such water rights for more than fifty years; that to dispossess them now would bring ruin to long-established settlers, and return to waste the lands which they, by their industry and with the acquiescence of the Government, reclaimed from the desert.

> Under such facts and circumstances this court is not moved to give a decree destroying the rights of the white pioneers."
>
> The exceptions of the United States were overruled (R. 492-493).

Thereafter, the District Court filed findings of fact and conclusions of law, and entered its decree (R. 494). *In its conclusions of law the Court states that even if a reservation of water might be implied in the order of* 1859, *"yet the facts and circumstances here shown impel the conclusion that the interests of the white settlers, enjoyed without challenge for more than fifty years, should not be disturbed."* (R. 515). *The Court concluded that the doctrine of appropriation applied to the claims of the United States, and that it was entitled, by right of appropriation, to divert waters of the stream to the extent of* 22.93 *cubic feet per second, for the irrigation of* 1,305.55 *acres, with priority as of the year* 1868, 1872, 1875, 1883, and 1886 (R. 499, 515-516). *The District Court entered its decree framed accordingly* (R. 531).

The United States has taken this appeal.

ARGUMENT

I.

THE UNITED STATES, BY THE CREATION OF THE WALKER RIVER INDIAN RESERVATION, DID NOT IMPLIEDLY RESERVE FOR THE INDIANS, OR FOR ITSELF, WATER OF THE WALKER RIVER FOR THE IRRIGATION OF THE IRRIGABLE LANDS OF THE RESERVATION.

A. Effect of Acts of Congress passed after the Appellant contends the Walker River Indian Reservation was created in 1859, concerning the public lands and waters of the Western states:

1. Acts of Congress:

The first pertinent Act after 1859 concerning the public lands of the United States was the Homestead Act of May 20, 1862, which allowed settlers one hundred sixty acres of land, and which required "actual settlement and cultivation."

12 Stat. at L. 392, Secs. 1 and 2.

On July 23, 1866, an Act was passed giving settlers a preferential right of purchase (14 Stat. at L. 253). Section 9 of this Act provided:

> "That whenever, by priority of possession, rights to the use of waters for mining, agriculture, manufacturing or other purposes, have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and decisions of court, the possessors and owners of such vested rights shall be maintained and protected in the same; ***"

In Broder v. Natoma Water & Mining Co., 101 U. S. 274 (25 L. Ed. 790, affirming 50 Cal. 621), it was said that this Act was *rather a voluntary recognition of a pre-existing right of possession* constituting a valid claim to its continued use, than the establishment of a new right.

Mr. Justice Field, in Jennison v. Kirk, 98 U. S. 453, (25 L. Ed. 240, 242) said:

"The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights being lost on the sale of the lands.***"

* * *

By the Act of July 9, 1870, it was provided:

"***and all patents granted or preemption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the Act of which this Act is amendatory.***"

16 Stat. at L. 218, Sec. 17.

The Desert Land Act of March 3, 1877, conferred upon the settler the right to acquire six hundred forty acres of desert land on condition that the same be irrigated.

19 Stat. at L. 377.

This Act was amended in 1891—See: 26 Stat. at L. 1096.

* * *

Other important acts with regard to public land are the Carey Act of August 18, 1894, 28 Stat. at L. 422, 43 U. S. C. A., page 371, Sec. 641; and the National Reclamation Act of June 17, 1902, 32 Stat. at L. 388, 43 U. S. C. A., page 298, Secs. 371-383.

2. Decisions Illustrating That Congress, Through These Acts and By the Admission of the Western States to the Union On An Equality With the Thirteen Original States, Has Relinquished Control Over the Waters of Western Streams:

An important case dealing with the relinquishment by the United States of its control over the public waters of the Western states is the case of United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690; (43 L. Ed. 1136 (1899)). The suit was brought to restrain the defendant from constructing a dam across the Rio Grande river in the territory of New

Mexico. The United States contended that this dam would interfere with the navigability of the Rio Grande, which in part was a navigable stream. The United States set up treaty stipulations between it and Mexico in reference to the navigability of the Rio Grande. The United States Supreme Court granted the injunction, as requested by the United States, in an opinion rendered by Mr. Justice Brewer.

The Rio Grande being a navigable stream, it was held that the impairment of the navigability constituted an injury and wrong to the people of the United States. The court said at page 703:

> "Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of all navigable water courses of the country even against any state action."

Mr. Justice Brewer, after reviewing the statutes of 1866 and 1877, stated that they did not create the inference that Congress intended to release its control over the *navigable* streams of the country.

The first proposition advanced by Mr. Justice Brewer, which is dicta in the above case, was repudiated by Mr. Justice Brewed in the case of Kansas v. Colorado, 206 U. S. 46 (51 L. Ed. 956), one of the greatest constitutional cases of the country, which was decided on May 13, 1907. This was an original Bill of the State of Kansas against the State of Colorado to enjoin the latter state from diverting the waters of the Ar-

kansas river. The United States, on leave, filed a petition of intervention, asserting that the amount of the flow of the river was subject to the superior authority and supervisory control of the United States. Petition in intervention of the United States was dismissed without prejudice to the rights of the United States to take any action necessary to preserve or improve the navigability of the river.

In this case the State of Colorado was diverting water under the appropriation system, and the State of Kansas under the riparian theory. The government set out that within the water-shed there were 1,000,000 acres of public land that were uninhabitable and unsalable. The government contended that the contention of neither state was correct and that either contention, if sustained, would defeat the object, intent and purpose of the reclamation act, prevent the settlement and sale of the lands and would otherwise work great damage to the interests of the United States.

Mr. Justice Brewer, at page 86, after quoting from the part of the case of United States vs. Rio Grande Dam & Irr. Co., set out above, states that if the government was contending that the appropriation for irrigation of the waters of the Arkansas was affecting navigability of the stream, it would become the duty of the court to determine the truth of the charge, but that the government was making no such contention.

Mr. Justice Brewer continues:

> "It rests its petition for intervention upon the alleged duty of legislating for the reclamation of arid lands; *** that the national government is itself the owner of many thousand acres; that it has the right to make such legislative provisions as, in its *judgment* is needful for the reclamation of all these arid lands, and, for that purpose, to appropriate the accessible waters."

Mr. Justice Brewer considers at length the constitutional background of the question, and concludes at page 93:

> "But it is useless to pursue the inquiry further in this direction. It is enough for the purpose of this case that

each state *has full jurisdiction over the lands within its borders, including the beds of streams and other waters.*

At page 94:

***"

"It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west of the appropriation of waters for the purposes of irrigation shall control. *Congress cannot enforce either rule upon any state.* ***"

In United States v. Central Stockholders Corporation, 52 Fed. (2d) 322, (C. C. A. 9, 1931) this Court had before it a case where the government, as owner of the public lands, was seeking to set up its right to the waters of San Joaquin river on the theory that the withdrawal of lands by the United States as a federal power site within the boundaries of forest reserve carried with it the waters of a stream flowing through the land. The Court, although not making a final decision as to the rights of the United States, said, as to the government's contention that California, under its enabling act (9 Stat. 452), is powerless to modify the proprietary right of the government by either legislation or judicial decision—at page 324:

"***We are thus asked by the government to re-write the water law of California as developed by its courts to the extent, at least, of holding that the large body of public land riparian to the streams of the state has rights entirely distinct from those defined and recognized by the law of the state of California. *Formidable as is the task thus presented with reference to the law of California, the contention made here would be even more discordant with the laws of the other states of this circuit which have not recognized the common-law rights of riparian ownership and have consistently based their law of water rights upon the appropriation of water* (*Arizona, Nevada, Montana, Idaho*). If it be true that the government, by reason of its ownership of large tracts of public lands, has a corresponding common-law right to the water of the streams as a part and parcel of land, and that such water cannot be taken away by state legislation *or judicial decision, the result of the government's contention would in such other states be even more disastrous to private ownership of water than it would be in the state of Cali-*

fornia, which has always recognized the rights of the riparian owner in and to the waters of streams."

The lower court in its opinion ((R. 403-409) quotes at great length from the case of the California-Oregon Power Co. v. Beaver Portland Cement Co. (295 U. S. 142) decided by the Supreme Court April 29, 1935. In holding that this decision was applicable to the facts in this case, Judge St. Sure (R. 404) says:

> "The decision is most important as directly affecting owners of lands in the desert land states, acquired under the homestead and preemption laws, the Desert Land Act and other acts passed by Congress and the appropriators of waters for beneficial use upon said lands. Suit was brought by the owner of lands in Oregon whose predecessor in interest acquired them by patent from the United States under the Homestead Act of May 20, 1862. The primary question presented to the Supreme Court for decision was whether the homestead patent carried with it as part of the granted estate the common-law rights which attach to riparian ownership."

Judge St. Sure then refers to that part of the opinion of Mr. Justice Sutherland which deals with the Acts of Congress we have hereinabove referred to, and the previous decisions of the courts interpreting them. Judge St. Sure concludes with the following quotation from Mr. Justice Sutherland's opinion (R. 408) which appears at 295 U. S. 162-163, to wit;

> "***It is hard to see how a more definite intention to sever the land and water could be evinced. The terms of the statute, thus construed, must be read into every patent thereafter issued, with the same force as though expressly incorporated therein, with the result that the grantee will take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location.
>
> "***Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect to waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877 if

not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the designated states,* including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state' Kansas v. Colorado, 206 U. S. 46, 94, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and give sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See Wyoming v. Colorado, 259 U. S. 419, 465.***"

See: Williams v. City and County of San Francisco, 76 Pac. (2d) 182, (Cal. 1938).

A very recent case of the Supreme Court of the United States, which deals with the problem involved here, is the case of Ickes v. Fox, 300 U. S. 82 (81 L. Ed. 525 (1937)). The court, in its opinion, at page 95, says as to the Congressional Acts referred to above:

"The Federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of (March 3) 1877 (Chap. 107, 19 Stat. at L. 377, 43 U. S. C. A. Sec. 321), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states. California Power Co. v. Beaver Portland Cement Co. 295 U. S. 142, 162, 79 L. Ed. 1356, 1363, 55 S. Ct. 725. And in those states, generally, including the State of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied."

One of the latest expressions of opinion as to the state's rights to make the United States subject to state laws in dealing with waters in Western states is United States v. Humboldt Lovelock Irr. L. & P. Co., 97 Fed. (2d) 38 (C. C. A. 9, 1938) (Certiorari denied) where at page 42 this court said:

> "Whatever rights appellant may have, and the extent thereof, must be determined by the law of Nevada. 43 U. S. C. A. Sec. 383; California-Oregon Power Co. v. Cement Co., 295 U. S. 142, 155, 162; 55 S. Ct. 725, 728, 730; 79 L. Ed. 1356. We must, therefore, review the statutes and decisions of that state to determine the questions herein.***"

In the case of Bergman v. Kearney, 241 Fed. 884 (D. Nev. 1917), in answer to the proposition that all unappropriated waters belonged to the United States Government, the Court said at page 892 of its opinion:

> "For years the National Government has consistently recognized and respected rights acquired by appropriation by the use of water. It has conformed to the state statutes regulating the acquisition of unappropriated water.***"

The Court then refers to the Act of 1866 and the Act of March 3, 1877, supra, and concludes at page 893:

> "***Both the state and the National Governments concede and have granted the privilege of acquiring rights to the use of water by appropriation."

A state case interpreting the aforementioned Acts of Congress is Farmer's Investment Co. v. Carpenter, 9 Wyo. 110, 138, 139; 61 Pac. 258, 265 (1900).

> See also: Basey v. Gallagher, 20 Wall., 681-682, cited with approval in Wyoming v. Colorado, 259 U. S. 419, at page 461.

The United States Supreme Court and Federal Court cases referred to above seem to be a complete recognition that the power of control and disposal of the waters of the Western streams is in the states, and the United States by the legislation hereinabove referred to has relinquished control over such waters.

3. In Accordance With the Decisions Referred to Above, This Court Must Apply the Water Laws of California and Nevada, as Derived from Local Customs, Laws and Decisions:

a. Law of California. The Court will take judicial notice that California was admitted into the union in 1850 on an equality with the thirteen original states. California has recognized that the riparian system is partially in effect, and also that the priority system is partially in effect.

The priority system originated among the old forty-niners of California in what was then neither territory nor state, but the unorganized public domain of the United States. Later, this system was recognized by judicial decisions and legislative enactment of the State of California. The first reported case sustaining the priority doctrine was Eddy v. Simpson, 3 Cal. 249 (1853).

The law of California, as far as this case is concerned, recognizes the appropriation, or priority system, as the appellant has stipulated that Appellee's rights may be determined on the basis of the appropriation system (R. 501).

b. Law of Nevada. This Court, in the case of United States v. Humboldt Lovelock Irr. L. & P. Co., supra, succinctly sets forth, at page 42, the applicable law of Nevada, as follows:

> "Nevada was admitted into the union as a state in 1864. Two years later, it was held that where the right to the use of running water was based upon appropriation, and not upon an ownership in the soil, the first appropriator had the superior right. Labdell v. Simpson, 2 Nev. 274. The question as to whether the common-law rule would be applied where one claimed rights by virtue of his ownership of the soil, was left undecided. It is here unimportant whether such common-law rule was thereafter applied because in 1885 such common-law rule was declared inapplicable. Jones v. Adams, 19 Nev. 78, 6 Pac. 442. In that case the doctrine that prior appropriation is prior in right was applied as against one owning the soil. Four years later the rule so announced was reaffirmed (Reno S. Works v. Stevenson, 20 Nev. 269, 21 Pac.

317), and was again reaffirmed in 1902. Walsh v. Wallace, 26 Nev. 299, 327, 67 Pac. 914. With regard to these decisions, the Nevada Supreme Court candidly stated 'that the courts "took the bull by the horns," and in effect repealed the doctrine of riparian rights without awaiting the action of the legislature.' V. L. & S. Co. v. District Court, 42 Nev. 1, 22, 171 Pac. 166.

"In Walsh v. Wallace, supra, 327, the rule, specifying what constituted an appropriation of water, was first announced. The requirements set forth that 'there must be an actual diversion of the same, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time'."

Even in the absence of any such stipulation as we have referred to above, it would follow that the water law of California and Nevada, derived from local customs, laws and decisions, would be binding upon this Court as there is no independent Federal common law that would give the United States rights other and different from those recognized by the laws of these two states. In United States v. Central Stockholders Corp., supra, this Court said at page 327 in referring to the Government's contention that it could apply a system of water rights other and different from that recognized by the law of California:

"***but also because there is no Federal common law to fix the rights of the Government in its capacity as proprietor thereof. ***" (This Court refers at length to the case of Kansas v. Colorado, supra.)

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

4. But Four Exceptions to the State's Complete Control Over the Disposition of the Waters Within Their Borders Have Been Recognized By the Supreme Court of the United States:

The United States Supreme Court has recognized that after the legislation by Congress with regard to public lands and waters, there are four exceptions to the power of the state to dispose of the waters of the streams within its borders:

First: That the state, by its control, cannot interfere with the navigability of navigable streams. United States v. Rio Grande D. & I. Co., supra.

Second: That a state may not, in case of an interstate stream, deprive the other state or states of its or their equitable portion of the water in the stream. Kansas v. Colorado, supra.

Third: Existing rights of individuals or the United States, acquired pursuant to Acts of Congress (especially the Acts of 1866, 1877 hereinbefore referred to) when recognized by and agreeable to "local customs, laws and decisions." California-Oregon Power Co. v. Beaver Portland Cement Co., supra.

Fourth: Those rights obtained by the Indians when the Indians conveyed their lands to the United States by treaty and reserved from the grant waters sufficient to irrigate their lands.

This fourth exception is illustrated by the case of Winters v. United States, 207 U. S. 564 (52L. Ed. 340), relied on so strongly by appellant (Appellant's Brief, pp. 20-33), in which the United States Supreme Court held that where the Indians, by treaty and binding agreement, had granted their lands to the United States and had reserved a smaller area for their own use and had made a prior appropriation of waters, they impliedly reserved sufficient waters to irrigate the remaining irrigable lands on their reservation.

The case of Winters v. United States, supra, and the principles therein involved are clearly not applicable to the facts of this case. In that case the facts upon which the decision is based are briefly as follows:

a. That the Fort Belknap Reservation of Montana was created pursuant to formal agreement or treaty between the United States and the Indians of the Fort Belknap Reservation, which treaty was ratified by Congress;

b. That prior to the creation of the reservation, the Indians of the Fort Belknap Reservation occupied a much larger tract of land which had been previously set aside

as a reservation by an Act of Congress, which larger tract was deemed adequate for their wants in the light of their habits as a nomadic and uncivilized people;

c. That the treaty was entered into while Montana was a territory, and the land was Indian country.

d. That the Indians had appropriated the amount of water involved, and had applied it to beneficial use before the alleged illegal diversions of the defendants;

e. That by this treaty the Indians agreed to occupy the reservation as a permanent home;

See: (Id) 143 Fed. 740, 144 (C.C.A. 9, 1906) (25 Stat. 114, c. 213);

f. The Indians were found by the Court to have been deprived of sufficient water to carry on agriculture under their changed conditions of living outlined in the treaty, and it was urged that, by reason of the treaty, there was an implied agreement on the part of the United States to reserve with the land, waters for the irrigation of the diminished area covered by the treaty.

For other and different distinguishing circumstances see the opinions in United States v. Winters 143 Fed. 740; Winters v. United States 148 Fed. 684 (C.C.A. 9, 1906).

Upon this state of facts the Supreme Court of the United States held that in view of all the circumstances of the transaction there was an "implied reservation" of a sufficient amount of water for irrigation purposes. The holding of the Supreme Court is only to the effect that such a reservation may be implied when there is a definite agreement or treaty involving the cession of Indian lands which would show an intention on the part of the contracting parties to make such a reservation, and the decision turns simply on the construction of the treaty or agreement.

Mr. Justice McKenna delivered the opinion of the court in the Winters case. We quote from the body of the decision, page 575-576:

> "The case, as we view it, turns on the agreement of May, 1888,resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant. The reservation was a part of a very much

> larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract would be too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession. ***"

The Court solves the conflict of implications by the construction of the facts and the treaty.

> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even if it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."

At page 578, the Court says:

> "But our construction of the agreement and its effect make it unnecessary to answer the argument in detail. For the same reason we have not discussed the doctrine of riparian rights urged by the government."

The Winters case is the only case on the subject decided by the Supreme Court of the United States so far as we have been able to ascertain.

B. The exception to the states' absolute dominion over the waters of its streams recognized in the Winters case does not avail the Appellant when setting up the interest of the Indians on the Walker River Indian Reservation.

1. The Factual Circumstances Prevent the Application of the Decision in the Winters Case:

a. In this case there is no treaty or binding agreement between the United States and the Indians, nor appropriation recognized by customs, law or decisions.

The Winters case rests on the treaty-making power of the United States, exercised at a time when Montana was not a state. If, as the government contends, the Winters case holds there was an implied reservation of the water, merely by setting aside that part of the country as an Indian reservation, then why did Mr. Justice McKenna emphasize what he referred to so often as the "agreement"? Why not simply say, as Appellant argues in its Brief, there was an implied reservation of the waters? It must be assumed that after Mr. Justice Brewer's decision in the case of Kansas v. Colorado, supra, the mere ownership or reservation of land by the United States was not enough to reserve an interest in the waters; that the United States by Congressional authority could only, in the absence of statehood, either expressly exercise its power over the waters and reserve them in itself, or, by agreement or treaty give the Indians an interest in the waters which the United States could enforce on their behalf. As we will hereinafter point out, the Indians never had any interest in the lands or waters and did not receive any interest from the United States which can be enforced against these Appellees in this present suit.

The United States Supreme Court emphasized the fact which really controlled the conflicting implications of the Winters case, that treaties with the Indians are construed in their favor, or as these ignorant and savage people would understand them. This proposition advanced in the Winters case as well as other

cases cited by Appellant, is too well settled to need additional citation. However, a recent case in this court reemphasizes this rule of construction.

> United States v. Nez Perce County, Idaho, et al., 95 Fed. (2d) 232 (C.C.A. 9, 1938), at 235.

See also:

> United States v. Shoshone Tribe of Wind River Reservation, 303 U. S. 629, (82 L. Ed. 763), (1938).

In the instant case the Appellant is contending that the acts of government agents in setting aside the reservation and the President's order of 1874 with regard thereto, conveyed an interest in the waters to the Indians. It is a well recognized rule of construction that in construing grants by the United States, the ordinary rule that the grant will be construed most strongly in favor of the grantee does not apply, as the United States holds the public lands as trustee for all the public. In the case of Shively v. Bowley, 152 U. S. 1, (38 L. Ed. 331) the court says at page 10:

> "***The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundations were felicitously expressed by Sir William Scott; 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives, and rights and emoluments of the Crown being conferred upon it for great purpose, and for the *public use*, it shall not be intended that such prerogatives, rights and emoluments are diminished by *any* grant, beyond what such grant by necessary and unavoidable construction shall take away.' The Rebeckah, 1 c. Rob. 227, 230. Many judgments of this court are to the same effect. Charles River Bridge Proprs. v. Warren Bridge Proprs., 362 S. 11 Pet. 420, 544-548 (9:773, 822-824); Martin v. Wadell, 41 U.S. 16 Pet. 367, 411 (10:997, 1013); Central Transp. Co. v. Pullman Car Co. 139 U. S. 24, 49 (35:55, 64)."

The United States was holding public lands of the Western States, as trustee, for all the people of the United States. Therefore, this Court should not find that the acts and orders relied

on by Appellant as giving the Indians an interest in the water had that effect in the absence of any language referring to the granting or reservation of any waters; whereas, patents issued to white settlers when construed in the light of the express legislation of Congress and in accordance with state laws had that effect.

United States v. Oregon, 295 U. S. 1, 27.

2. THE PAHUTE INDIANS HAVE NO INTEREST IN THE WALKER RIVER RESERVATION LAND OR WATERS, EXCEPT SUCH WATER RIGHTS AS HAVE BEEN RECOGNIZED IN THEM UNDER THE LAWS OF THE STATE OF NEVADA:

a. The United States Government has never recognized any interest in the lands or waters by aboriginal right or occupation in the public domain purchased from Mexico under the Treaty of Guadalupe Hidalgo as Mexico did not recognize any such interest in the Indians..

In the case of United States v. McGowan, 89 Fed. (2d) 201 (C. C. A. 9, 1937) an issue was involved as to whether land purchased by the United States within the State of Nevada as an Indian colony deprived the State of its jurisdiction thereover in criminal matters. The issue in the case was whether an "Indian Colony" was "Indian Country" within the terms of a statute, 25 U. S. C. A. Sec. 247. In its opinion this Court said at page 202:

> "The land in issue was bought by the United States from Mexico by Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922). The Indians never had possessory title to the land. It was never 'Indian Country' by reason of ancient traditional continuous Indian rights until title was divested by the United States or abandonment by the Indians. The United States was thereafter divested of title to the land by its public land laws.
>
> This land was therefore not a part of the vast extent of the domain to which any Indian title attached, nor has the land been set apart or designated exclusively for an Indian tribe.***"

This case was reversed by the United States Supreme Court, Mr. Justice Black writing the decision, on the ground that the

United States intended to extend its criminal jurisdiction over 'Indian Colonies' as well as 'Indian country'. The language of this Court above referred to was not questioned. (See 302 U. S. 835, 82 L. Ed. 305).

The only definition of "Indian Country" is to be found in 4 Stat. at L. 729 (1834). This definition stated that Indian Country was, in part, "all that part of the United States West of the Mississippi River***". This statute was enacted long before the Mexican War and the Treaty of Guadalupe Hidalgo. By the treaty with Mexico, "New Mexico" and "Upper California" were ceded to the United States. New Mexico included part of the area of the present state of the same name, all of Arizona, except the southern part (which was purchased in 1853), all of Nevada, and parts of Utah and Colorado. "Upper California" included what is now California. See "Narrative and Critical History of North America," Winsar, Vol. 7, page 552, for map showing exactly the territory acquired.

Thus, not one of the reported cases cited by counsel in support of the principle of the Winters case, including the Winters case itself, involved territory which was obtained from Mexico, and all involved territory where the aboriginal right of occupancy was recognized. In these states the territory did not become public lands until the Indian title was extinguished by treaty, or otherwise.

See in this regard: Mitchell v. United States, 9 Pet. 711, 9 L. Ed. 283, as to the recognition of Indian title to land obtained from Spain and Great Britain.

Another case holding that in the territory derived from Mexico there was no Indian title to be extinguished is Hayt v. United States, 38 Ct. Cl. 455. See also: Pino v. United States, 38 Ct. Cl. 64.

b. No title or interest was given to the Pahute Indians by the acts of the commissioners or the executive order relied on by Appellant.

Since the Indians had no aboriginal interest or title to the lands in question, the question is whether the gratuitous act of setting apart the reservation amounted to a conveyance by the United States to the Indians of enough water to irrigate any land. In other words, has the United States vested in these Indians any property right it can enforce on their behalf? In the opinion in the case of United States v. Powers, 16 Fed. Sup. 155 (D. Mont. 1936) (which was affirmed by this court in 94 Fed. (2d) 783, C.C.A. 9, 1938), the Court at page 162 quotes from Morrow v. United States, 243 Fed. 854, 856, as follows:

> "There is no question that the Government may, in its dealings with the Indians, create property rights, which, once vested, even it cannot alter. ***Such property rights may result from agreement between the Government and the Indian. Whether the transaction takes the form of a treaty or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resulting vesting of a property right in the Indian."

We have referred above to the fact that in this case there was no treaty or agreement with the Indians.

That there was no title or interest given to the Indians by the presidential order appears from the case of United States v. Ashton, 170 Fed. 509 (Wash. cc. W. D. 1909) (appeal dismissed 220 U. S. 604), in which the Indians were suing through the United States to quiet title to lands held by defendant under the State of Washington. These lands were tidelands. The Court in denying the relief said at page 516:

> "A very good decision of this case could be made in a short paragraph, stating the simple proposition that the complainants are not entitled to prevail, for the reason that they have failed to set forth in their bill of complaint any deed, grant, law, treaty, record, or prescriptive right evincing any color of title in the Puyallup Tribes of Indians as a community to any part of the shore lands involved in this litigation.***"

At page 519:

> "***Of course, a mere change of conditions would not annul a valid grant of property rights, but the executive

> orders making a reservation of public land *for use of the Indians were not irrevocable, nor in any sense a grant of title. The difference between a reservation and a grant is as wide as the difference between a tenancy at will and a freehold.****"

There is no question that the United States, by acts of the Secretary of the Interior, pursuant to acts of Congress, conveyed its fee simple title to the upstream white settlers and water users.

c. What the United States should have done for the Indians in 1859 or 1874, or what it meant to do is a political question and should not be decided by this Court.

In the case of United States v. Title Insurance and Trust Co., 265 U. S. 472, 68 L. Ed. 1110, the Court, speaking through Mr. Justice VanDevanter, said at page 485:

> "Again, it is said that the Indians were, prior to the cession, the wards of the Mexican government, and by the cession became the wards of this government; that, therefore, the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians.****"

That there is a guardian and ward relationship between the United States and the Indians, the Appellees do not deny, but before the guardian can sue on behalf of the ward, there must be a property interest or right of the ward involved. As we have shown above, the Pahute Indians had no aboriginal right or title by occupancy in the land involved, nor did they acquire

any title by the Act of the Government in reserving the lands of the Walker River Reservation from public sale, and for the use of the Indians.

We might state at this time that, although there is some confusion as to just what theory the Government is relying on in bringing this suit, it seems to be most apparent that they are trying to establish a right in the Indians, and that the Government is suing to enforce that right of the Indians. As we have illustrated from cases cited above, the Government cannot prevail on any theory.

d. There was never any requirement that the Indians live on or cultivate the reservation lands.

In the Winters case, as we have pointed out, the Court stressed the fact that the Indians, by the Treaty, had not only ceded and given up lands for a smaller reservation, but that they had agreed to occupy the reservation created under this Treaty.

The fact remains, that there has never been any requirement that the Pahute Indians live on the Walker River Reservation lands.

C. Other factual circumstances at the time of the creation of the Walker River Reservation.

1. California Was a State at the Time Walker River Reservation Was Created:

As we have hereinbefore pointed out, at the time the Walker River Indian Reservation was created in 1859 or in 1874, California had long since been a state and had assumed sovereign power over the waters within its borders. In 1859 Nevada was a part of Utah Territory and afterwards the Territory of Nevada was created. In 1864 Nevada was admitted to the Union. The land within the State of Nevada was never Indian country. The local customs, laws, and decisions of the Territories were given effect by the Act of 1866. See Basey v. Gal-

lagher, 87 U. S. 670. In the Winters case the reservation was created at a time when Montana was not a state, and so there was no conflict of sovereign power.

2. In 1859 Pahutes at War With Whites:

The record shows that in 1859 the Pahute Indians were at war with the whites and were so at war for some time subsequent to 1859 (R. 396-398, 574, 575, 576, 585-586, 592, 602, 603, 737, 754, 770-772, 773, 831).

Because the Pahutes were a warlike, uncivilized people and were, in 1859, when the commissioner of the General Land Office made his recommendation, actually at war with the United States, there could have been no agreement with the Indians. The *facts* are that the reservation was set aside for the protection of the emigrants and to insure peace. There seems to be no justification for the Appellant's statement, page 32, note 8, that the creation of the reservation had, at least, the "tacit consent" of the Indians.*

3. Purpose of Setting Aside Particular Tract of Land as an Indian Reservation:

The 86,400 acres of land withdrawn for sale by President Grant in 1874, as an Indian reservation, was chosen by the Government for the reason that it provided a source of Indian food, which was fish, roots, pine nuts, nut-grass, and game. The reservation was chosen for these natural supplies of sustenance for the Indians (R. 588, 592, 595, 605, 651, 758).

If the government had contemplated at the time of the creation of the reservation that the Indians should support themselves by agricultural pursuits, they would have chosen a site for the reservation in one of the fertile upstream valleys, which would have had a more adequate water supply, especially in dry years; because, as we have pointed out in the statement of

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*That there was no "tacit consent" of the Indians to the creation of the reservation appears from a judicial decision by the Supreme Court of the State of Nevada in the case of State v. McKenney, 18 Nev. 182, at 198-199 (R. 831).

evidence, there are many miles of sandy and gravely beds before the water reaches the Walker River Indian Reservation at the very end of the river. The Appellant's Brief, page 24, quotes from the Special Master's report, and the matter there quoted seems to be illogical and wrong, when we compare the statements therein to the actual facts. On page 25 the Appellant makes the following statement:

> "The record is specific that the reservation was created to reserve for the Indians sufficient of *their* lands to enable them to sustain life (R. 569),***"
>
> See also: Appellant's Brief top of page 18.

As we have demonstrated above, this statement is incorrect because these were not "their lands," and never had been their lands by aboriginal right or otherwise; and the main purpose of the reservation was to protect the emigrants, preserve peace, and give the Indians the exclusive right to the fisheries and the sources of the natural Indian foods. As we have shown from our statement of the evidence, the cultivation of the Indian lands was rather an afterthought, and it was many years before any Indian was cultivating any land. A very few acres were put into cultivation by the Government farmers.

If it were contemplated that they were to use the land for agricultural purposes to the extent, as alleged, of cultivating 10,000 acres, then the Appellant and the Indians have apparently done very little, if anything, to effectuate that purpose in these sixty-five years.

D. Since, under the Constitution, Congress has the power to dispose of public property, the implied acquiescence of Congress to acts of the departments and presidential orders should be strictly limited to expressed purposes and language. No more public property should be found granted or reserved than is done so by express language.

Article 4 Sec. 3 Clause 2 of the Constitution of the United States provides: "The Congress shall have power to dispose

of and make all needful rules and regulations respecting the territory or other property belonging to the United States." It would seem that Congress, alone, and only by some definite act on its part, could reserve the waters of the Walker River for the Indians. This because it is taking away the rights from one part of the public domain and giving it to another part. In this case the Government is relying on the act of a department head on November 29, 1859, as establishing the Walker River Indian Reservation; this act of the department head being ratified by a presidential proclamation or executive order on March 19, 1874. In a note, page 8, the Appellant sets out the fact that both the Special Master and the District Court found that the reservation was created on November 29, 1859, and cites authorities. Cases there cited are easily distinguished from this case and do not take up the question as to what happens when between the act of the department head relied on and the executive order many years later, there have been intervening rights of innocent third parties, whose rights were acquired pursuant to Acts of Congress. The most enlightening decision on the effect of executive orders and acts of department heads, counsel for the Appellees were able to find, is the case of United States v. Midwest Oil Co., 236 U. S. 459, (59 L. Ed. 673 (1915)). In that case Mr. Justice Lamar reviewed the power of the department heads and President to withdraw lands by executive order, without express statutory authority. At page 469 it is stated:

> "***For it is to be especially noted that there was no Act of Congress providing for bird reserves or these Indian reservations***. There was no statute empowering the President to withdraw any of these lands for settlement or to reserve them for any of the purposes indicated, page 471.*** And in making such orders, which were thus useful to the public, no private interest was injured. For, prior to the *initiation of some right given by law,* the citizen had no enforceable interest in the public statute and no private right in the land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or

location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large***."

The Court, page 472, supports this usage on the ground that the Government is a practical affair intended for practical men and states:

"***Both officers, lawmakers and citizens naturally adjust themselves to any long continued action of the Executive Department, on the presumption that *unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.* That presumption is not reasoning in a circle, but the basis of a wise and quieting rule, that, in determining the meaning of a statute for the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation."

At page 475:

"***These orders were known to Congress, as principal, and not in a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, *but did not interfere with any vested right of the citizen.*

The Court thus recognized that the power over the public domain was, to the fullest extent, in Congress. The implied authorization of executive withdrawals from long continued acquiescence is to apply ordinary principles of agency.

But because the guardianship of the public domain was a trust in Congress and there was here no express enactment, no more of the public domain should be taken from the public than is actually set out. The case does not recognize any additional authority in the President or the department heads to control the public domain or to dispose of the water.

Furthermore, it is submitted that the question of ratification, or relation back is material. It could not have related back to the prejudice of intervening rights acquired by the settlers under congressional legislation between the act of the de-

partment head and the ratification by Presidential proclamation.

Taylor v. Robinson, 14 Cal. 396 (1859).

In the situation presented by this case, between the date of the letter of November 29, 1859, and the Presidential order of 1874, Congress had enacted the Act of 1862, the Act of 1866, and the Act of 1870 with regard to the public domain. Certainly the executive order could not destroy the established policy of the United States expressed by Congress in these acts. At the time the executive order was made and at the time as the Secretary of the Interior requested the order, in 1874, the United States and the Secretary of the Interior were fully informed of the fact by department records that the whites had settled the Walker River Valley and had filed many homesteads and had preempted lands under the existing land laws, and that they were using water for the irrigation thereof. In the face of these facts and because there was no express statutory authority for these withdrawals, and because no mention was made of water in the executive order of March 23, 1874, this Court should not find that the Government did reserve any water for the Indians. It will appear, as has been stated above, that there was nothing expressed in the letters or order relied on by the Appellant in regard to water. This Court should not read into these documents that which does not appear on the face of them. There is a further interference with a vested right if this Court should apply the Government's theory of implied reservation of water, because at all times important here California was a state and had full jurisdiction over the waters therein. See Kansas v. Colorado, supra. Although the Walker River Indian Reservation is located in Nevada, the contended for theory of the Appellant, if adopted, would greatly impair the water rights of the Appellees located in California, as well as in Nevada, which have been acquired under and recognized by local custom, laws and decisions of California and Nevada. We may point out here that the United States is not claiming as a riparian owner, or as an appropri-

ator, but is saying that it reserved enough water to irrigate the lands within the Walker River Indian Reservation. The case of Kansas v. Colorado, supra, would seem to be a complete answer to this contention of the Appellant.

When once a state had come into being, any act of the President which would interfere with a state's sovereignty and powers of disposition over the waters of the streams within its borders, came too late.

E. Decisions supporting Appellees' contention that the Winters case does not apply to the facts of this case.

1. Cases Involving Indian and Other Reservations Which Hold That There Is No Implied Reservation of Water and Which Hold That the State Law Applies as to the Disposal and Ownership of the Water:

The case of United States v. Wightman, 230 Fed. 277, 283 (Ariz. 1916) holds that the withdrawal of lands by the United States from sale and entry does not operate as a withdrawal of water by implication. The case was decided by Judge Sawtelle who stated the issue as follows, at page 282:

> "Are the waters on an Indian Reservation reserved for the use of the Indians?"

At page 283:

> "***The view that the Winters v. U. S. case, supra, turned solely on the agreement with the Indians, is strengthened by an examination of the brief of counsel for the United States, when they say on page 573 of 207 U. S. (28 Sup. Ct. 207, 52 L. Ed. 340): ***"

> "This view was sustained by the Supreme Court of the United States, and is the sole basis out of which the equities in favor of the Indians arise. *The decision is not an authority that the mere creation ex vi termini reserves to the Indians, or to the United States for their benefit,* the beneficial use of all waters flowing within the reservation. There is no treaty right of the Indians involved

in this case, and there are no equities growing out of such treaty or agreement in the case. The United States certainly had the right to devote waters rising within the reservation to the use of people living outside the reservation, and the Indians could not complain."

In Krall v. United States, 79 Fed. 241 (C. C. A. 9, 1897) The Court said: page 242,

"***The creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation* thus established by the government in respect to the waters of the nonnavigable streams upon the public lands.***"

Semble: Larson v. Johnson 23 Ariz. 360, 203 Pac. 874 (1922).

In Sowards v. Meagher, 37 Utah 212, 108 Pac. 1112 (Utah, 1910), the Court had before it a case involving an attempted appropriation of water of a stream while the land was part of an Indian reservation. The reservation was subsequently opened fo r settlement, but the issue was whether the application so made to divert waters was valid when made while the place of diversion was located on an Indian reservation. At page 1115 of the opinion, the Court held:

"***It is now well-settled and recognized that there is a distinction between initiating or acquiring a right to the use of unappropriated public waters on the public domain, and a right or interest in or to the public lands themselves, and that the former is not dependent on the latter. *To initiate and acquire a right in and to the use of unappropriated public water, whether on the public domain or within a reservation or elsewhere, is dependent upon the laws or customs of the state in which such water is found.****

"***In this respect the appropriation of unappropriated public water on a reservation and the location of a mining claim or other lands on or within a reservation rest on different foundations, and are controlled by different principles. The one is a proper subject of rightful appropriation. The other is not. An appropriation made of such waters will be protected, even as against the government of the United States.***"

The above case is cited with approval in Adamson v. Black Rock Power and Irrigation Co. 2 Fed. (2d) 437, C.C.A. 9, 1926.

The case of Byers v. Wa-Wa-Ne, 86 Ore. 617, 169 Pac. 121 (1917) was a statutory water adjudication proceeding in which the United States appeared and sought to establish the rights of sundry of its Indian wards, claiming for them water adequate for the irrigation of so much of their allotments as were situate in the bottoms of the Umatilla river. Byers filed contest against the United States on the ground his rights were superior to those of the Indians and the United States. The Indians, in 1855, had ceded to the United States a large territory, and the Treaty set aside a smaller portion of land for them. The contestant's ditch was built under the permission of an agent in charge of the reservation, and this permission was confirmed by federal statute in 1885. At the hearing the witnesses for the United States testified that 5300 acres of bottom land could be irrigated if the water diverted by contestant were available. The United States claimed that the right to use the waters of the Umatilla for irrigation was impliedly reserved to the Indians by Treaty of June 9, 1855, and the Act of 1885 granted only a revocable license to use the water, subordinate at all times to the rights of the Indians therein. The lower court held for the United States and the Indians. Both parties appealed, and upon the appeal the decree was modified. At page 126, the court said:

> "There is no mention of water in this Treaty except in connection with the exclusive fishing right granted to the Indians.*** But unless the implication of these water rights is found in the Treaty when read in the light of these purposes and circumstances, the rights contended for must be held to be non-existent."
>
> "On this branch of the case the Government relies on Winters v. United States *** and United States v. Conrad Investment Co.***"

The Court, after discussing these two cases, went on to say on page 127:

> "***These authorities do not hold, as we read them, that a mere creation of an Indian reservation by treaty

impliedly secures to the Indians all waters in streams which touch the reservation which they at any time desire to put to a useful purpose.***"

The Court concludes at page 128:

"We cannot find, in the circumstances and conditions attending the negotiations of the Indian Treaty of 1855, any suggestion that the waters of the Umatilla River were impliedly appropriated for the use of the Indians whenever they should see fit to avail themselves of these waters. The language of the Treaty is silent on the subject. The right claimed is not essential to the maintenance of the Indians or to their progress in the arts of civilized life.***

On the whole case we are satisfied that the rights of the Indians are paramount only to the extent of the waters they require for household use and watering of livestock. With this qualification the rights of contestant as adjudicated by the Circuit Court are superior and paramount to those of the United States as guardian of the Indians."

This case is distinguished from the case here because it involved the construction of a treaty. The Court points out that in the absence of express words or necessary implications from the treaty water is not impliedly reserved for Indians on an Indian reservation.

The contentions of the Appellees find support in a series of cases relating to an analogous situation. These cases involve the question of whether, when by treaty or an executive order, an Indian reservation is set aside, there is also impliedly set aside the tidelands adjacent thereto. Comparable to Winters v. United States, supra, with regard to the implied reservation of the waters of a non-navigable stream, is the case of United States v. Stotts, 49 Fed. (2d) 619, (Wash., 1930). This was a suit, brought by the United States, to quiet title to certain tidelands allegedly included in the Lummi Indian Reservation, to which defendants claimed an interest through purchase from the State of Washington. The facts were that Governor Stephens of Washington Territory entered into a treaty with the Indians in 1855. In 1873 the President of the United

States issued a proclamation establishing the reservation pursuant to the Treaty. The proclamation defined the boundaries as extending to the "low water mark on the shore of the Gulf of Georgia." The State had conveyed these tidelands to the defendants. At page 620 of its opinion, the court said:

> "It is primer law that Indian treaties are to be liberally construed, to the end that Indians will retain the benefits conferred by the treaty at the time of its execution." (Citing cases).
>
> "The Indians' right of occupancy is not predicated upon a grant by the United States, but under a reserved aboriginal right which the Indians inherently held in the land segregated and withheld from the land ceded by the Indians under the treaty." (Citing cases).

The Court, after holding that the United States had the power to grant the tidelands to the Indians, stated:

> "***I think the court may judicially know that the Indians subsisted during this time by hunting and fishing, and the tidelands were a necessary prerequisite to the enjoyment of fishing and which was evidenced by the proclamation of the President carrying the reservation to low water, and this treaty having been promulgated and these rights having been enjoyed by the Indians from time immemorial and until after the admission of the territory as a state and to the present, the defendants may not complain.***"

On page 621, the Court says:

> "Each treaty and proclamation must rest upon its own provisions.***
>
> "The reservation of the tideland was made very plain by definite declaration in extending it to low tide ***, and the purpose is clear from Article 5 of the Treaty, where the right to take fish on the usual and accustomed grounds and stations is reserved.***"
>
> Cf. United States v. Holt State Bank, 270 U. S. 49, 70 L. Ed. 465.

In commenting on this case the Court in the Stotts case, supra, says at page 621:

> "In United States v. Holt, supra, there was nothing approaching a right to the underlying mud lake, nor anything indicating any purpose to withhold the land from the future state. *In this case there is the specific declaration and the enjoyment during the entire period by the Indians.*"

If the Stotts case, supra, is comparable to the Winters case with regard to implied reservations of tidelands, then the case of Taylor, et al. v. United States, 44 Fed. (2d) 531 (C. C. A. 9, 1930) (certiorari denied United States v. Taylor, 283 U. S. 820, 75 L. Ed. 1436) is comparable to this case and sets out the principles we are contending for. This was a suit by the United States to restrain the maintenance of certain barges off the Indian village on the Quileute River. The issue turned upon whether the tidelands under the barges was a part of the Indian reservation. The Quileute River was a navigable stream. The Indians, by treaty, in 1855, had ceded a large area of land to the United States, the treaty providing that there should be reserved, for the use of the Indians, lands to be selected by the President. Article 3 of the treaty reserved to the Indians the right of taking fish at all usual and accustomed grounds and stations, in common with all citizens of the territory. The reservation was set apart by executive order of President Grant, in 1873, and by the order of President Cleveland, in 1889, which described the land according to Government survey. This court reversed the lower court and dismissed the action. At page 532 this court said:

> "***It is conceded that the grant of such lands by this description to private individuals would convey no rights below the high tide. The question is whether, in setting apart these lots of land for the Quileute Indians, a different rule obtains, so that the United States Government, as trustee for the Indians, retained title and jurisdication over the bed of the Quileute river. The question is not free from difficulty, although similar questions have been frequently considered by the courts with relation to Indian reservations. In every case called to our attention the description of the lands reserved to the use of the Indians either expressly included the body of water under consideration, or the description included land below the

high water mark, thus showing the intention to reserve lands for the Indians held in the sovereign right of the government for public purposes."

At page 533:

"***It must be conceded that the government of the United States could cede to an Indian tribe tideland and submerged land held by it by virtue of its *sovereignty*. Alaska Pacific Fisheries Co. v. United States, 248 U. S. 78, 39 S. Ct. 40, 63 L. Ed. 138; Donnelly v. United States, 228 U. S. 243, 264, 33 S. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913 E. 710; Shively v. Bowly, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331, supra.***"

"***In other words, does the fact that the Indian tribe in question had reserved to it the upland bordering upon a navigable stream and navigable waters by *necessary implication reserve for their use the right in the adjoining navigable water, its tide and submerged lands?****"

At page 534:

"After all, the question is one of intent to be determined from the terms of the instruments under consideration in the light of surrounding circumstances and the history leading up to the promulgation of the instrument. In the President's proclamation under consideration, the navigable waters surrounding and adjacent to the uplands described in the instrument are not referred to in any manner.*** To hold that these tide and submerged lands were reserved for the Indians by the executive order of President Cleveland, we must not only infer from the mere circumstance, that the Quileute Indians are a political body, that they were given a right in navigable waters and the lands thereunder, but also that it was the intent of the President to deprive the state of jurisdiction thereover and title thereto." "***If we recognize the rule that in grants to Indians uncertainties are to be determined more favorably to them than to the government, we must here recognize that the government act is dual in its effect, if so construed, as it takes from the state a right already expressly granted to it and reserves it for a political body, not by express grant or reservation, but by mere implication.***"

At page 536:

"There is nothing in the description of the land contained in President Cleveland's executive order which jus-

> tifies an inference that it was the intention to reserve for the Indians lands below the hightide line or lands covered by the navigable waters adjoining the lands conveyed."

2. Interpretation of the phrase, "subject to existing rights" to be found in the Desert Land Act of 1877.

Appellant, in a note beginning on page 13 and continuing over to page 14 of its Brief, seeks to diminish the effect of the case of California Oregon Power Co. v. Beaver Portland Cement Co., supra, on the ground that if the United States impliedly reserved waters, that such a reservation was not affected by the Desert Land Act, since that Act provided that appropriations of water under it would be "subject to existing rights." A complete answer to this contention of the appellant is to be found in the above-cited case, at page 162, (295 U. S.):

> "The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.*** The only exception made is that of *existing* rights; and the only rule spoken of is that of *appropriation.*" (Italics those of the United States Supreme Court.)
>
> See also: Williams v. City and County of San Francisco, supra.

In the case of Byers v. Wa-Wa-Ne, supra, the Court, after stating that the Government contended that a proviso to the statute of 1885, which made it subject to "any existing right to a reasonable use of the water of said stream for agricultural purposes," etc., subjected this water right to the paramount right of the Indians, said at page 126:

> "***The word 'existing' is significant. An existing water right presupposes a well defined plan for utilization of the water coupled with reasonable diligence in applying it to a useful purpose." (Citing many cases.)

That the four limitations Appellees have set out above, on state power, are the only ones that the courts will recognize,

seems to conclusively appear from several of the very late cases cited by Appellant in its Brief, page 23; especially United States v. Powers, 94 Fed. (2d) 783 (C. C. A. 9, 1938). (Affirmed: January 9, 1939 U. S. S. C.)

> Skeen v. United States, 273 Fed. 93 (C. C. A. 9, 1921);
> United States v. Parkins, 18 Fed. (2d) 642, 643 (Wyo., 1926);
>
> United States v. Hibner, 27 Fed. (2d) 909 (D. Ida., 1928).

These cases all emphasize that the right reserved in the Indians was due to the fact that there was a reservation of the waters in the Indians, because they ceded lands to the United States and there was a reservation implied in the grant, and that the reservation was by the Indians and not by the United States. For example in Skeen v. United States, supra, page 95, the court says:

> "First, The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians.***"

In United States v. Parkins, supra, the court emphasises the fact that the rights of the Indians under the treaties became fixed and established before the act of admission, which made Wyoming a sovereign state.

In United States v. Powers, supra, the court emphasized that the rights so reserved by the Indians continued to exist against the United States and its grantees, as well as against the state and its grantees.

These cases seem to conclusively illustrate that in the absence of such a reservation in the Indians from a grant of their lands to the United States, the United States can claim no interest in the waters, in itself, or for the benefit of an Indian tribe.

> See United States v. Powers, 16 Fed. Sup. 155, at 159, Affd. 94 Fed. (2d) 783, at page 786.

This court at the page last cited, states as follows the United States' contention as to its superior rights:

> "Appellant (United States) contends that, prior to the Treaty of May 7, 1868, all rights in and to the waters of Lodge Grass Creek, Little Big Horn River, and their tributaries, were the property of appellant; that all such rights were by said treaty reserved to appellant and have never been relinquished; that no one else—Indian or white—has ever had the right to divert or use any of said waters without appellants' consent; that no such right was conveyed to or acquired by any patentee of allotted lands in the Crow Reservation; and that, in diverting and using said waters for the irrigation of their lands, appellees are trespassers, and should be enjoined. Appellants' contention is unsupported by authority and is contrary to holdings of this court in Skeen v. United States, Conrad Investment Co. v. United States, and Winters v. United States."

The case of Alaska Pacific Fisheries v. United States, 248 U. S. 78, cited on page 27 of Appellant's Brief is easily distinguished from the fact of the instant case. As this court said in its opinion in Taylor, et al. v. United States, supra, at page 535:

> "The question is one of construction, of determining what Congress intended by the words 'the body of lands known as Annette Islands'.***"

This court emphasized that the case turned on the fact that the geographical name was used in a sense to embrace the intervening and surrounding waters as well as the upland. In other words, as descriptive of the area comprising the islands.

II. IN ADDITION TO THE LEGISLATION BY CONGRESS WITH REGARD TO THE WATERS OF WESTERN STREAMS, (IA above) THE CONSTRUCTION GIVEN TO THIS LEGISLATION BY THE GOVERNMENTAL DEPARTMENTS AND OFFICERS CHARGED WITH ITS EXECUTION IS ENTITLED TO GREAT WEIGHT.

A. As is shown by the evidence, the Appellant relied upon the doctrine of appropriation until as late as 1910 for a water supply for the Walker River Indian Reservation. (R. 436, 498, 821, 822, 830).

The contemporaneous construction of a statute or statutes by those charged with their execution, especially when it has long prevailed is entitled to great weight, and should not be disregarded or overturned, except for cogent reasons and unless it is clear that the construction is erroneous.

United States v. Finnell, 185 U. S. 236, 244

United States v. Johnston, 124 U. S. 236, 253

Taylor v. Tayrien, 51 F. (2) 884, 891

Smith v. Baltimore & O. R. Co., 48 F. (2) 861, 866

See also extensive note in 73 Lawyers' Edition 325

As we pointed out in the Midwest Oil Company case, supra, the Appellant must depend on this same theory to support a finding that there was a creation of the Indian Reservation in either 1859 or 1874. Since this is so, the acts of the officers in charge of the Walker River Indian Reservation become very important especially when the Appellant is relying upon an undisclosed intention to reserve the waters of the Walker River from further appropriation. The acts of the officers and of the department heads in charge of the Walker River Reservation would seem to be conclusive evidence of the fact that there was no intention on the part of the United States to reserve the waters for the use of the Indians in either 1859 or 1874. The rule contended for above finds support in several of the cases cited by the Appellant. See especially McFadden v.

Mountain View M. & M. Co., 97 Fed. 670, 677, and United States v. Minnesota, 270 U. S. 181, 205.

This same rule should apply to the granting of the patents and other titles to the upstream white settlers by the officers of the United States and Secretary of the Interior who were authorized to administer and execute its land laws. These disposals were made to the White settlers on behalf of the United States by officers to whom it had committed the administration of the land laws; and these disposals were consummated in many instances by patents signed by the President of the United States.

In the case of United States v. Wightman, 230 Fed. 277 (D. Arizona, 1916) the court says at page 284:

> "The same officers of the government charged with the protection of the Indians also execute its land laws, for both are under the charge of the Secretary of the Interior, and his action in approving the sale of the land with water rights is of equal dignity and binding force on the government as the demand now made by his subordinate with his approval for the use of the waters by Indians***"

These patents which are construed according to the law of the state where the land lies are the most accredited type of conveyance known to our law, and the United States has confirmed these patents issued by its authorized officers by its "silent acquiescence" with full knowledge of the situation and by its retaining with such full knowledge all the benefits received.

The Appellant to meet this firmly entrenched proposition of law merely assumes that the acts of these officers and department heads were unauthorized and then states that the United States is not bound by such unauthorized acts (See Appellant's Brief, page 46). But as we have above pointed out these were the very officers to whom the United States had committed the administration and execution of the public land laws and the affairs of its Indian wards.

B. Decisions referring to the fact that the United States has not sought to apply the Winter's case to all Indian Reservations.

In United States v. Powers, 16 Fed. Sup. 155 (D. Montana, 1936), the court says page 163 of its opinion:

> "The numerous acts of Congress appropriating large sums of money for the purchase of water rights on Indian reservations covering a period of many years would seem to indicate that Congress and the Interior Department have not always adhered to the doctrine laid down in the Winter's Case, but have been controlled to a great extent by the facts as they appeared to be in each particular instance."

Page 164:

> "If the facts here were the same as in the Winter's Case and the whites were taking the water under the Desert Land Act, applying it to lands outside of the reservation and claiming superior rights to the Indians who had long prior to the advent of these desert land entrymen appropriated and used the waters of the stream in question, then it can be well understood how the Indians and their guardian might have cause to complain that their rights were being impaired,***"

In a note by the court to the case of California-Oregon Power Company v. Beaver Portland Cement Company, supra, page 1364, (79 L. Ed.), it is said:

> "In this connection it is not without significance that Congress, since the passage of the Desert Land Act, has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards."

There has been a long continued course of action on the part of the legislative and administrative officers, charged with the administration of the public lands and Indian affairs, recognizing that the state law as to the appropriation of water is controlling except, as we have pointed out above, in cases where the Indians in granting Indian land to the United States impliedly by agreement or treaty reserved waters in themselves.

In 1926 Congress appropriated money for a reconnaissance to determine, among other things, how the water supply of the Walker River might be augmented to provide additional waters for the Walker River Indian Reservation. (Appellant's Brief page 53; Act of June 30, 1926, 44 Stat. 779). This was not an act of an administrative officer but an act of Congress recognizing the situation created by the use of the water by the Appellees on their lands obtained when the Appellant conveyed to them its fee simple title pursuant to earlier acts of Congress and its great public policy in connection with the arid public lands.

III. EQUITABLE CONSIDERATIONS.

A. The United States as a suitor in a court of equity is bound by the principles and rules of equity.

In Brent v. Bank of Washington, 10 Peters 596, 9 L. Ed. 547, the court stated the rule as follows: (page 554)

> "***Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in The United States v. Mitchell (9 Peters, 743), have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. * * * This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject."

See also Iowa v. Carr 191 Fed. 257, 266, and cases cited therein, and Walker v. United States, 139 Fed. 409, 414.

In Folk v. United States, 233 Fed. 177 (C. C. A. 8, 1916) the court says at page 191:

> "*** This is a suit in equity. In such a suit the claims of the United States, or of the Creek Tribe, appeal to the

> conscience of the Chancellor with the same, but with no greater or less, force than would those of a private citizen, and, barring the effect of mere delay, they are judicable in a court of chancery, to whose jurisdiction the state or nation or tribe submits them by every principle and rule of equity applicable to the rights of private citizens under like circumstances (Citing cases) *** Even where equities are equal the defendant prevails ***."

See also: United States v. Arredondo 31 U. S. (6 Peters) 691.

That the courts have applied equitable principles and rules in substantially similar situations appears from the case of United States v. Ashton, supra.

In the case of State v. Towessnute, 154 Pac. 805 (Wash. 1916), (rehearing denied 155 Pac. 1041) the court refers to considerations that should be applied to the case here. At page 806 the court states:

> "***Inconvenience or loss to ourselves, however great, is no ground, indeed, for taking away any rights that the Indians may actually possess, but is proper to be considered in deciding from a dubious document whether Congress, looking to the future of this commonwealth ever intended to bestow them."

The argument of the Indians was that as there was a treaty there was an implied reservation of all that the Indians did not expressly convey. In answer to this contention the court continues at page 807:

> "The Indian was a child, and a dangerous child, of nature, to be both protected and restrained.***
>
> "The treaty, then, interpreted as provision from the great guardian of this tribe, should be construed toward benevolence and even be bent somewhat toward the Indian's notion of his rights. On the other hand, the children of the donor are not to be ignored. The whites, too, were to enjoy, and enjoy by right, the waters and the soil. The document must be read from that point of view as well."

The court concludes that the United States through Congress did not intend to cripple the governments of future states in powers essential to them. On page 809 the court suggests

that the act of admitting a state on an equality with the original states might by implication revoke the previous treaty rights of the Indians.

The court, page 809, says the following of the Winters case, supra:

> "Winters v. United States * * *, is as easily distinguished; for what that decided was that the Enabling Act of Montana did not give water appropriators rights superior to appropriations made by government officials on an Indian reservation for the benefit of that reservation, when the appropriations were made before statehood. The equal-footing right of Montana when entering the Union was clearly not impaired."

We have cited the above case at this point to illustrate that this court should, in deciding what the undisclosed intention of the government was, if there was any such undisclosed intention, apply equitable principles to the facts in order to arrive at its conclusion. The Appellant should not be able to prevail on such an undisclosed intention if it is inequitable and oppressive to the white settlers in their enjoyment of the land by titles obtained under Congressional Acts and without fraud or wrongdoing on their part.

The Brent case, supra, is cited approvingly in the case of the United States v. Ingate, 48 Fed. 251, which holds that where the United States voluntarily appears in court it places itself on an equality with other litigants.

The Appellant takes exception to the application of equitable principles against the United States especially where it will "frustrate the purposes of its laws or to thwart public policy." (See Appellant's Brief 56 and 57).

The cases cited by Appellant show the great interest of the United States in its public lands which are held in trust for all the people. See especially in this regard United States v. Trinidad Coal & Coking Company, 137 U. S. 161, 171, 34 L. Ed. 640. As these cases emphasize, the United States holds the public land in more than a mere proprietary capacity. So for many years the United States, acting as both trustee of the public

lands and as guardian of the Indians, carried on a course of conduct with regard to the public domain which resulted in the settlement of the Walker River basin by the pioneer whites under titles derived from the United States. The United States at the same time as guardian of the Indians assisted them in bringing the lands under cultivation and applying the water to beneficial use under the appropriation system of the State of Nevada. It would seem that upon application of ordinary equitable principles the United States should not now be able to say that in spite of its long continued acquiescence in the upstream settlements and its compliance with the water law, it had impliedly reserved in 1859 or in 1874 waters which never could be appropriated by the upstream white settlers and which were never subject to state laws or any recognized system of water law either under the appropriation or the riparian doctrines. Thus, to apply the statement in Appellent's Brief we have referred to above, these equitable principles will not be applied against the United States "to frustrate the purpose of its laws or to thwart public policy." We have first in this case a situation where the public land laws and the United States' great interest in having its public lands occupied have been not frustrated but fulfilled, and the great public policy of the United States, as the trustee of the public lands for the benefit of all the people, has been discharged. It would indeed be inequitable for the United States to now set aside the acts done under the Congressional legislation with regard to the public lands on any theory that it owed a higher duty to the Indians.

Not only are the above mentioned acts of Congress, and the acts of those charged with the duty of carrying them into effect, inconsistent with the thought that there was any reservation of the waters of the Walker River in 1859 or 1874, but it would seem that even if the Secretary of the Interior or the department heads had reserved the waters, these inconsistent acts of Congress would have deprived the Indians of any interest they might have by such an attempted reservation. There can be no doubt that inconsistent acts of Congress prevail over the

interests of the Indians. We need do no more than cite cases set out in Appellant's Brief to support this statement. In Lone Wolf v. Hitchcock, 187 U. S. 553, (Appellant's Brief page 32) it was held that even where there was a treaty, Congress had the full power to abrogate its terms for their own good or for the good of the country. In Spalding v. Chandler, 160 U. S. 394, (Appellant's Brief page 30) the court held, at page 406 of its opinion, that Congress had the power to invade the sanctity of the Indian Reservation and make a grant to a Canal company. The Supreme Court's decision in the case of California-Oregon Power Co. v. Beaver Portland Cement Co., supra, is a clear recognition that Congress no longer recognized any reservation of waters for any purpose unless obtained pursuant to "local customs, laws and decisions", or unless it was obtained under the treaty making power of the United States.

This line of thought would distinguish the Winters Case from this case. There the reservation was created by a treaty in 1885, after the acts of 1866 and 1877. In that case the treaty, which is part of the supreme law of the land, by its necessary implications created an exception to the Acts of 1866 and 1877, so far as there were unappropriated waters of the Milk River. This was through the exercise of the treaty making power of the United States in the absence of statehood.

The cases the Appellant cites on page 57 of its Brief emphasize that the United States holds its public lands not as a mere seller but as a trustee of the public. The cases involve situations where there were elements of wrongdoing and fraud on the part of the defendants.

In our case it is not claimed or pretended that there was any fraud or wrongdoing involved in the issuance of patents or the disposal of land to the White settlers under the Homestead Act. Preemption Laws, Act of 1866, Desert Land Act, or the several school grants. The Appellees are before this court with "clean hands" and there is no reason that the maxim of equity "that he who seeks equity must do equity" should not be applied against the United States. Here there has been no attempt

by these Appellees to circumvent the laws of Congress or the exercise of the public policy of the United States. As we have stated above, these Pioneer settlers took up and purchased the upstream lands from the Appellant under the laws of Congress and pursuant to the public policy of the United States that those arid lands should be put to the highest beneficial use. These White settlers are in an especially strong position to demand that the United States do equity in the premises.

The Appellant either waived intention to or concealed intention to claim a prior and superior right in and to the waters of Walker River and tributaries over the public at large for whom it held the public lands in the capacity of trustee, and the intending appropriators and improvers who took up the upstream lands under the Acts of Congress.

The great public policy of the United States has been served by allowing the upstream whites to occupy the Walker River Basin. In disposing of these lands to the Appellees the United States was acting in a proprietary capacity and its acts, conduct and representations should in equity bind it in the same manner and to the same extent that private individuals would be bound.

United States v. Chandler-Dunbar Water Co. (C. C. A. 5,) 152 Fed. 25 at 40-41. (Affirmed 209 U. S. 447).

As we have pointed out above, the Indians have no rights that they could set up against either the Appellant or the Appellees, so the Appellant may not say that it is suing in its sovereign capacity to enforce the interest of the Indians. It is merely able to sue as the proprietor of certain lands which are not held as trustee for the general public as are public lands, but are merely held for the use of certain Indians which have no rights as against the United States. The Indians are not the real parties in interest so the cases cited by Appellant in its Brief as to the Guardian and Ward relationship are not applicable. (See Appellant's Brief pages 54-55).

In this connection it might be noted that in the present case the Appellant is seeking to establish for the Indians a right which they have not heretofore enjoyed, and, in the sixty-five years since the time when it is claimed such right was created, no effort has been made to enjoy such right except to the very limited extent above noted.

In other words, the Appellant is not attempting to restore to the Indians something which was once theirs or to establish the Indians' claim to rights which they once exercised.

Appellees most strongly insist that this right never existed in the Indians and that what is now attempted to be done by the Appellant is to recall the governmental grants given to the white settlers and to confer upon the Indians rights which for sixty-five years they neither claimed nor used.

The Appellant not only is saying that it is not bound by any principles or rules of equity and fair dealing, but it is seeking to set up a right to the use of the waters of the Walker River unknown to any theory of water law which applies or has ever applied in the United States. The Appellant is not seeking to come under the riparian or appropriation systems of water law, but is claiming a water right for non-existent Indians on lands that have never been cultivated, and presents a situation that is not covered by the exception recognized in the Winters case, supra.

B. The principles of equity underlying the doctrine of laches and estoppel are a bar to the Appellant's suit.

1. LACHES:

It may be conceded that the United States is not ordinarily bound by mere delay or state statutory periods of limitations. However, the United States as a souvereign, as we have pointed out above, is subject to the equitable principles that are the basis for these doctrines. In this connection, while recognizing that the government has a policy in regard to the Indians and that

its policy is a very commendable one, the question arises as to how long the appellees are expected to wait before the governments acts upon that policy. In this case it has waited approximately sixty-five years, during all of which time it has not merely "slept on its rights" and allowed the development of the Walker River basin, but it has invited and encouraged these settlers by acts of Congress.

As early as 1904, when case No. 731 was commenced and in which the Appellant was invited to set up its rights, it was obvious that there was a shortage of water on the Walker River and storage was required for the Whites. At that time witnesses were alive who could have testified as to the conditions existing at the time the reservation was created both on the reservation and among the upstream Whites. By waiting until 1924 to set up the claimed rights of the Indians the United States has not only prevented the Appellees from having these witnesses, but has also put them to great expense in litigating the same issues that could and should have been decided in Case 731. It is one of the equitable bases for the doctrine of laches; that a suitor cannot so long sleep on his rights that time prevents the proper presentation of a remedy or defense; and also by laches cause the other party to suffer detriment.

21 C. J. (Equity) Sec. 211, p. 210 et. seq.

2. ESTOPPEL:

The Appellant has contended in its Brief, pages 33-60, that the United States may not be estopped and that the facts of this case would not constitute estoppel between individuals. In our discussion we shall show that in this case estoppel does apply against the United States and that the facts of this case would constitute an estoppel between man and man.

Closely related to the doctrine of laches is the doctrine of equitable estoppel. The equitable principles upon which the doctrine of estoppel is based are that it would be inequitable because of the acts and conduct of the person seeking relief to enforce them against a person who in good faith has relied

upon such conduct and who has been led thereby to change his position and acquire rights. The United States as a suitor is not exempt from the principles underlying the doctrine of laches and estoppel from any notion of extraordinary prerogative but for reasons of public policy. The United States v. Kirkpatrick 9 Wheat. 720, 735, 6 L. Ed. 499.

The doctrine of estoppel rests on principles of universal justice and should be applied against the sovereign in a proper case as it is applied against an ordinary individual.

> Walker v. United States, 139 Fed. 409 (C. C. Ala.), Id., 148 Fed. 1022 (C.C.A.).

It is submitted that the essence of estoppel is unfairness to one party, and the principles underlying estoppel should be allowed in all its degrees unless it would impair the inherent sovereignty of the United States. In this case, as we have hereinbefore pointed out, the Appellant did the acts, relied on here to estop it, in the exercise of its sovereignty and to carry out its obligations as trustee of the public land. The observance of honest dealing with the White settlers who in good faith took up the public land becomes of greater importance than passing gratuities to the Indians. See United States v. Wallamet Valley and C. M. Wagon Road Co. 42 Fed. 351, 358-359 (Ore., 1890).

In none of the cases cited by the Appellant were there involved, as in the instant case, the rights of an innocent purchaser of property from the government without notice of the government's adverse claim or interest and without knowledge of circumstances to put him upon inquiry.

To illustrate the contention that where the means of knowing the facts are available to both sides there can be no estoppel, Appellant cites cases on page 51 of its Brief. The only facts Appellant relies on to give this notice are set out in a finding of the Master (R. 271, Brief pages 51). As Appellees have pointed out in their statement of the evidence, the evidence shows that it was many years after 1859 before the Appellant's

farmers had cultivated any land and it was many years before the Indians cultivated any lands for themselves. It is to be assumed that because this finding was not supported by the evidence the District Court made no such finding. There was nothing about the desultory attempts to cultivate the lands of the reservation that would lead to the conclusion that the Appellant had reserved all the waters of the Walker River for any lands that might be irrigated by any Indians that might ever make the reservation their home. The cases cited by Appellant involved factual situations which the courts found were necessarily known to both parties. For example, the case of Morris v. Bean, 146 Fed. 423, is distinguishable, as appears in part from the language cited therefrom on page 49 of Appellant's Brief:

> "* * * complainant and intervener were relying upon the same water to maintain their improvements *already made,* and to carry on their farming operations *already begun.* Under this view of it the one side is as much estopped as the other."

The Court in Morris v. Bean also holds that there were no laches on the part of the moving party as he had constantly protested while the supply of water grew less from year to year.

As appears from the evidence, the two elements italicized in the above quotation were not present in the case at bar, and further, the Appellant in this suit is not limiting its claimed rights to merely provide water for farming operations that may now exist on the reservation. In our case the fact that the Indians finally engaged in diverting water and applying it to beneficial use may have been known to some of the upstream White settlers but there was nothing from the physical set up that would show the Indians or the United States claimed an implied reservation of water for ten thousand acres of uncultivated lands for non-existent Indians. There is no foundation therefore for the statement that the facts were equally known to both parties and hence there were not elements on which an stoppel can be founded. This discussion applies also to the rest of Appellant's cases on page 51 of its Brief. These cases cited

on page 51 do not support Appellant's contention that this rule should apply to this case as there the means of knowledge or notice was of a public law, either an Act of Congress, or a treaty or was from the physical facts. In the case here there were neither public laws nor physical facts to give the White Pioneers knowledge of the government's implied reservation of the waters of the Walker River.

The statement made by Appellant, bottom of page 51 and top of page 52 of its Brief, is without merit, because the Court will take judicial notice that under the Desert Land Act, if not before, there was machinery set up to determine what lands were arid, and it was only after there was such a finding that patents were issued.

In the case of Lancashire Shipping Company v. Elting, 70 Fed. (2) 699 (Appellant's Brief, page 51) the agent of the Secretary of Labor was charged with knowledge of the records of his department.

To further illustrate that to make the Appellant's contention effective there must be notice from either physical facts or public law, we call the court's attention to the case of United States v. Conrad Investment Company, 156 Fed. 125, (Appellant's Brief, pages 44-45). This was a case where an estoppel would not apply under the facts. There was involved a treaty by which the Indians had ceded their lands to the United States and had reserved what was not expressly granted. This treaty was, like all treaties, a public law and a part of the supreme law of the land, and, as an act of Congress, is presumed to be known to all. For this reason the court, in that case, properly held that "The settlers must necessarily take with full knowledge of the law." (See quotation at bottom of page 45 of Appellant's Brief).

See also: Carpenter v. United States, 111 U. S. 347.

In the instant case, the acts of the department heads in withdrawing the land from sale were not laws and were not notice to the upstream Whites that waters were "impliedly reserved".

It is obvious that grave injustice would be done by permitting the United States to proceed with its claim irrespective of its negligent and harmful delay. Nothing short of a binding precedent would justify a ruling that the Appellant should not be bound by such applicable equitable principles.

See: The Falcon, 19 Fed. (2) 1009 (Md. 1927).

There seems to be no good reason why under the facts of this case the Appellant should not be estopped in the same manner as would an individual.

United States v. Stinson, 125 Fed 907 (C. C. A.) Id. 197 U. S. 200, 49 L. Ed. 724.

It is clear from the authorities that the United States can be estopped by the legislation of Congress and the acts of the departments and officers pursuant to such legislation.

21 C. J. page 1185, Section 190.

Appellant at page 40 of its Brief, seeks to deny the application of the doctrine of estoppel by saying that the United States cannot be estopped by unauthorized acts of its agents, citing Utah Power and Light Co. v. United States, 243 U. S. 389, and Cramer v. United States, 261 U. S. 219. These are clearly cases where the agent was unauthorized and was acting wrongfully and fraudulently. In this case the acts of the agent were done pursuant to Congressional legislation and these authorized acts estop the Appellant because these officers and department heads were authorized to dispose of the public lands and to carry on the affairs of the Indians, and it must be assumed that they were acting within the purview of their authority. See Duval v. United States, 25 Ct. of Cl. 46, and Harston v. United States 21 Ct. of Cl. 451.

A recent case holding that the sovereign state of Pennsylvania could be barred by laches and estoppel was the case of Penn-

sylvania v. Union Traction Company of Philadelphia, 194 Atl. 661 (Pa. 1937), wherein the court said, at page 674:

> "Estoppel does not depend on time alone but on action and failure to act after knowledge. 'But it is unnecessary to multiply cases that all proceed upon the theory that laches is not, like limitations, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, and inequity founded upon some change of conditions or relations of the property of the parties.' Galliher vs. Cadwell 145 U. S. 368, 273, 12 Supreme Court 873, 875 36 L. Ed. 738 * * * "

In United States v. Beebe, 127 U. S. 338, 348, 32 L. Ed. 121, after holding that under the facts of that case the United States was estopped by laches, the court sets out facts that contributed to its findings that the government was barred so analogous to the facts of the instant case that we repeat them here.

> Page 348:
>
> " * * * The fact that a city has been built upon the land in question; the occupation of large portions of it by hundreds of innocent purchasers, the homesteads of many families covering other portions of it; the uninterrupted possession maintained for more than a generation, all resting upon faith in the patent issued by the United States Government,—constitute reasons more than sufficient for the refusal of the court to set aside such patent at the suit of a party who has so long slept upon his alleged rights."
>
> See also: United States v. Ashton, supra; Moran v. Horsky, 178 U. S. 205, 208; Mountain City Copper Co. v. United States, 142 Fed. 625.

The acts and conduct of the Appellant, through its officers and agents in disposing of its public domain under the legislation of Congress to the Appellees, and the expenditure of millions of dollars on irrigation works, houses and other improvements by the Appellees, have, as Judge St. Sure pointed out in his supplementary opinion (R. 492, 14 Fed. Sup. 10), placed the white settlers in an "inexpugnable position". Under such facts and circumstances, this court should not be moved to give a decree destroying the rights of the White Pioneers,

and throwing back to their native arid state, these thousands of acres of producing lands.

To summarize Appellees' contention that the equitable principles behind the doctrines of laches and estoppel bind the United States—the "acquiescence" by act and silence which extended over such a long period of time controls the rights and remedy of the United States in obedience to the equitable maxims: "He who seeks equity must do equity," and " He who comes into equity must come with clean hands." See: 21 C. J. page 1216, Section 221; First Federal Trust Co. v. First Bank of San Francisco (C. C. A. 9, 1924) 297 Fed. 356; United States v. Central Stockholders Corp., supra.

CONCLUSION

The form of decree suggested by the Appellant, (Brief page 60), would be so indefinite as to destroy the values of all the lands of the Appellees, and render them of fluctuating and uncertain worth. This proposed form of decree illustrates the great objection to the Appellant's attempt to establish the interests of non-existent persons on lands that have never been brought under cultivation. Also, it should be taken into consideration that the storage reservoir that the Appellant has built for the Indians since this case was tried and the evidence closed now furnishes additional water for the Indian lands.

Appellees feel that nothing more readily recommends itself to the understanding of this court than the picture presented by the evidence of the arid lands of the Walker River basin being brought slowly into cultivation by the upstream white settlers, who as patentees and transferees of the fee simple title of the Appellant, changed the forbidding nakedness into fertility and productiveness, where otherwise there would be sterility, so that communities have been created with thousands of people who are dependent upon the life-giving waters of the Walker River.

To grant the Appellant the relief it seeks would be to deprive the Appellees of water and return to their former worthless

state thousands of acres of hard earned lands. All this would be done because of an afterthought on the part of the Appellant or an exercise of "hindsight" to the effect that the Appellant now feels that when it created the Walker River Indian Reservation it should have reserved what, in dry years, would be all the waters of the river. As we have pointed out heretofore, what the government intended to do for the Indians at Walker Lake as regards water was not on record in the Land Office, nor in any treaty, or in any record that has been introduced into evidence.

Appellees have emphasized throughout this Brief that no one of their predecessors in interest acquired lands upstream without believing that after acquiring the fee simple title to the lands from the Appellant and by appropriating the water and applying it to beneficial use he was getting a permanent right to the water and that this right constituted the most of the value of the land for which he paid. This belief has been encouraged throughout the years by the Appellant and by the courts, and emphasized when the Appellant was invited in 1904 to set up any rights it might claim in suit 731 and it failed to do so. Appellees are not able to conceive that the Appellant should now be able to say that when it conveyed its fee simple title to the land it did not include that which gives the land its only value in the western states—the water.

Thus the Appellees are startled when the Appellant, after the White settlers have been appropriating and using the water for some sixty-five years, seeks to deprive them of these waters, without compensation, for non-existent Indians on uncultivated lands. The surprise of the Appellees is understandable and it would seem that the sound principles of the cases that have been cited in this Brief and the ordinary constitutional guarantees should protect them in what they regard as their property. (In this connection we again refer to the case of Farmer's Investment Company v. Carpenter, supra.) Especially is this true when it is remembered that the great public policy of the Appellant was to encourage the reclamation of the public lands

and, as trustee for all the public, see that they were settled and cultivated.

For any and all the reasons set out in this Brief, it is respectfully submitted that the decree of the District Court be affirmed and the Appellant dismissed hence.

WILLIAM M. KEARNEY,

EDWARD F. LUNSFORD,

MYRON R. ADAMS,

GEORGE L. SANFORD,

WILLIAM H. METSON,

ROBERT TAYLOR ADAMS,

Solicitors for Appellees.

APPENDIX A

IV. Discussion of Cases Cited in Appellant's Brief.

Cases cited by Appellant on pages 20-23 of its Brief to support the implied reservation theory are distinguished from the case before this court because:

1. They each involve a situation where the Indians by treaty ceded a larger body of land to the United States and reserved in themselves a smaller area; the courts holding that what had not been expressly granted to the United States was reserved by the Indians.

2. The court had before it to construe, a treaty or agreement with the Indians and in so doing found that such a reservation of water was within the language of the treaty or agreement.

The case of Spalding v. Chandler, 160 United States 394, (Appellant's Brief page 30) involved a treaty and is simply a holding that the Indians held the land reserved to them by the same title under which they had previously held it. As we have stated above there was no previous interest in the Indians in the Walker River Reservation lands. A reading of the complete paragraph on pages 402-403 of the opinion illustrates that the case does not support the Appellant's statements on page 30 of its Brief.

The case of McFadden v. Mountain View Min. & Mill. Co., 97 Fed. 670, (Appellant's Brief page 31) and the other cases and opinions cited thereon simply determine that after a reservation is created it is closed to mineral locations or other trespassers by the Whites. See: Sowards v. Meagher, supra.

The United States v. Kirkpatrick, 9 Wheat. 720, (Appellant's Brief pages 16, 38) involved a situation where laches was set up against an action by the United States on a bond. The court, page 733 of its opinion, states that the laches would not discharge a contract of this nature between individuals, so, of

course, the doctrine of laches would not apply against the government.

In the case of United States v. Beebe, 127 U. S. 338, (Appellant's Brief pages 16, 38) the doctrine of laches was applied against the United States. This case is also authority for the proposition that equity will not give relief where there is gross negligence or delay. (See page 347 of the opinion).

The facts of the case of Utah Power & Light Co. v. United States, 243 U. S. 389, (Appellant's Brief, pages 17, 38, 40, 46) are concisely set out in United States v. Southern Power Company, 31 Fed. (2) 852, (C. C. A. 4, 1929) at page 857, wherein the court says:

> " * * * In that case the power company, without contract or permit, constructed reservoirs, power lines, etc., upon forest lands of the government, relying upon an understanding with certain government officers that all rights essential thereto would be granted under the act of 1905 (33 Stat. 628). It was held that the government was not bound or estopped by the agreement of its officers *which the law did not permit,* and that the company could claim nothing under the act of 1901 (31 Stat. 790) because it had not conformed to its requirements or received any permission or license under it. In that case the defendant entered into an agreement, not authorized by law, with regard to the public domain, which officers of the government could not deal with, except in accordance with the powers conferred upon them by law. * * * "

Of course in such a situation the doctrine of laches would not bar the government. In the case before this court there is no question of the Appellees' failure to comply with acts of Congress; and as before stated, the fee simple title was conveyed to them by properly authorized agents under Congressional legislation.

> "Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations, may be acquired in accordance with local laws, but these enactments do not require particular mention, for this is not a controversy over water

rights, but over rights of way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned. See Snyder vs. Colorado Gold Dredging Co. 104 C. C. A. 136, 181 Fed. Rep. 62, 69."

(Id. 243 U. S. at 410-411).

The many cases on page 39 of the Appellant's Brief are merely cumulative and most are cited in Utah Power & Light Company v. United States, supra. They involve distinguishing features clearly apparent upon reading, and, in most of the cases there were not such laches as would bar a suit by an individual to enforce the individual's interest in property owned by him.

The case of United States v. Standard Oil Company of California, 20 Fed. Supp. 427, (Appellant's Brief pages 17, 39, 47, 50, 51, 52) involved a situation where the title to land in the United States had never been divested. In our discussion of the case of Brant v. Virginia Coal & Iron Co., 93 U. S. 326, (Appellant's Brief pages 17, 48, 51) we will further distinguish the language of the Standard Oil Company case.

The case of United States v. Minnesota, 270 U. S. 181, (Appellant's Brief pages 16, 39) involved a treaty situation, and the court holds that the United States can remove "unlawful obstacles" to the fulfillment of its obligations to the Indians and that state statutes of limitations are not a bar.

The cases of Utah Power & Light Co. v. United States, 243 U. S. 389, and Cramer v. United States, 261 U. S. 219, have been distinguished hereinbefore on the proposition for which they are cited in Appellant's Brief, page 40, and we have pointed out that the acts of the officers of the Land Department and Indian Department, both under the Secretary of Interior, were to carry out the purposes of those departments and the legislation by Congress with regard to the public lands, and that under such legislation their acts were authorized, sanctioned, and permitted as they were the very officers charged with carrying into effect the legislation of Congress in regard to the public

lands. (This comment applies also to Appellant's argument and cases on page 46 of its Brief).

The case of Cramer v. United States, supra, recognizes what the Appellees have contended for: that rules of law and equity apply against the United States as against any other suitor as the Supreme Court modified the decree of the Circuit Court of Appeals and applied the well recognized rule that possession alone, without title or color of title, confers no right beyond the limits of actual possession; so the United States was limited to the lands actually occupied and fenced by the Indians.

The argument of Appellant in its Brief, bottom of page 44 and top of page 45, is not applicable to the case before this court. The Indians involved here have no title to the lands of the reservation even at the present, except as to very few allottees.

United States v. Morrison, 203 Fed. 364, (Appellant's Brief, page 44) is not authority for any proposition involved in this case. In fact, the opinion states that the Indian Agent denied under oath that he gave consent to the illegal diversion of the waters from the government's ditch.

The cases of United States v. Standard Oil Company of California, 20 Fed. Supp. 427 (Appellant's Brief, page 47), and Brant v. Virginia Coal & Iron Co., 93 U. S. 326 (Appellant's Brief, page 48), and Morris v. Bean, 146 Fed. 423 (Appellant's Brief, page 49), involve a mistaken definition of equitable estoppel when applied to the situation before this court. To understand why this definition should not be applied to the facts of the case here we shall refer to Pomeroy's discussion of the doctrine applied in Mr. Justice Field's holding in the case of Brant v. Virginia Coal & Iron Co., supra, set out on page 48 of Appellant's Brief. This case adopts the theory that fraud is the very essence of equitable estoppel and that an actual fraudulent intent to mislead is a necessary requisite.

Pomeroy on Equity Jurisprudence, Vol. 2 (Fourth Edition) Section 806 and Note page 1653 and 1654.

This rule, as Pomeroy points out on page 1655, was a doctrine developed long before modern rules of equitable estoppel by conduct were recognized. "It is confined to estates in lands." At page 1656 Pomeroy states the reason for the rule as being that to estop the owner of land by his acts and preclude him from setting up his legal title is opposed to the letter of the statute of fraud, and so, unless there is actual fraud the parol evidence rule would be violated by the introduction of this evidence.

Since the statute of frauds is in no manner involved in the case before this court, this rule does not apply and this definition of equitable estoppel is not applicable to the facts. The court should not limit the application of general principles of equity applicable to this case because there was no fraud except in the sense that to permit Appellant now to set up its claim after its acts and conduct relied on by the Appellees to bar this action, would be "unconscientious" or "inequitable." See also Galbraith v. Lunsford, 87 Tenn. 109, 9 S. W. 365 (1 L.R.A. 522, 527 and note citing cases).

The Appellant cited Brant v. Virginia Coal & Iron Company, supra, to support the proposition that even between individuals the "facts and circumstances" relied on here by Appellees would not constitute laches or estoppel. That this is not true see United States v. Beebe, supra; United States v. Ashton, supra; Galliher v. Cadwell, 145 U. S. 368; Notten v. Mensing, 45 Pac. (2) 198, 3 Calif. (2) 469; Chicago v. Union Stock Yards, 164 Ill. 224, 45 N. E. 430. See also our many cases cited under III "Argument".

We have heretofore admitted that the relation between the United States and the Indians was that of guardian and ward, but as we therein stated the ward must have some interest or title before the guardian can sue on its behalf. Here any title or interest that the Indians may have is due entirely to the beneficence of the United States, and the plenary power of the guardian over the interest and title of the Indians is well settled.

As the legislation by Congress and the acts of the officers charged with the execution of the legislation with regards to public lands has been entirely inconsistent with the theory of implied reservations of water for the Indians, it seems clearly inequitable for the United States even on behalf of its wards to claim freedom from equitable principles. See Vinson v. Graham, 44 Fed. (2) 772 C. C. A. 10, 1930). Cases cited by Appellant, pages 54 to 55, are easily distinguished from the case here. The Indians and their guardian knew of the conditions on the Walker River for this long period of years and assisted in the establishment of them.

Cases cited by the Appellant either involved situations where there were no representations by either the guardian or the ward or there were illegal sales of the ward's property without obtaining the required order of court, and in general these cases did not involve facts which showed strong equities in favor of the one seeking to set up the estoppel. It is well established that the doctrine of estoppel is applicable to a guardian and ward situation where the guardian's acts are authorized and are not a fraud upon his ward. Each of the cases cited by Appellant in this connection is concerned with a situation where the guardian's acts with relation to his ward's property were unauthorized. In the instant case, the acts were authorized and proper; and furthermore, there is no property of the ward involved herein.

APPENDIX B

Discussion of Unreported Cases Cited in Appellant's Brief. Pages 23, 29-30.

United States v. Orr Water Ditch Company, et al, referred to in Appellant's Brief, pages 23, 29, 30, is a case which is still pending in the United States District Court for the District of Nevada. The Master appointed by the court to take testimony in said case and to report proposed findings and decree, rendered his report in the year 1926, or thereabouts, and recommended that the distribution of the water of the Truckee River be administered in accordance with the Master's proposed findings and decree for a period of three years. The court, therefore, entered a temporary restraining order so as to permit the distribution of the waters for a trial period. Numerous exceptions were filed to the Master's report and many of these exceptions have never been heard or disposed of to date. There has been no final decree entered in the cause. The quotation from the restraining order referred to on page 30 of Appellant's Brief is taken from the Master's report, and while it is correct that the temporary restraining order contains such language, no serious objections were interposed to the entry of the restraining order so that the distribution of water under the Master's report might be given a fair trial before the exceptions were disposed of. The exceptions still stand undetermined with reference to this particular finding of the Master. We feel, therefore, that it is not a final decision of the court in any respect, nor has it any greater force or effect than did the findings of the master in this case, which were substantially the same when submitted to the court and were reversed by Judge St. Sure.

As to the other unreported cases cited pages 23 and 29 of Appellant's Brief, the opinions were not available to the Appellees. In reply to letters with regard to these opinions the Appellees received the following correspondence from the clerks of the respective United States District Courts:

"Department of Justice
Clerk's Office United States Court
District of Colorado

"George A. H. Fraser, Clerk
William Graf, Chief Deputy Clerk

Denver Colorado,
January 5, 1939

Mr. William M. Kearney,
Attorney at Law,
Reno, Nevada.

Dear Sir:

"Receipt is acknowledged of your letter of the third instant relative to Equity Cause No. 7736, United States vs. Morrison Consolidated Ditch Co.

"No opinion was filed in this case.

"Decree for plaintiff on stipulation and order pro confesso was filed and entered of record on October 25, 1930.

Yours very truly,

GEORGE A. H. FRASER,
Clerk. "

H.

" Department of Justice

UNITED STATES DISTRICT COURT

Office of the Clerk
District of Utah

Salt Lake City, Utah,
January 4, 1939.

U.S. vs. Cedarview Irrigation Co.,
Equity 4427

U.S. vs. Dry Gulch Irrigation Co.,
Equity 4418.

Mr. William M. Kearney,
Attorney at law,
Reno, Nevada.

Dear Sir:

"Replying to your letter of January 3, the files in these two cases do not show that an opinion was handed down, however, in March of 1923 a decree was signed in each case by Judge Johnson fixing the distribution of water and the number of second feet to be diverted in several ditches and canals and to retain jurisdiction of the cases by appointment of a water commissioner to administer the decree.

"We do not have extra copies of the decrees and should you desire them our charge for typeing in No. 4427 would be $3.50 and in 4418 the cost would be $2.70.

Very truly yours,

W. B. Wilson, Clerk.

By V. P. Ahlstrom,
Chief Deputy."

APPENDIX C

Appellant on page 11 of its Brief states that; "In 1926 Congress (Act of June 30, 1926, 44 Stat. 779) authorized a reconnaissance to determine the feasibility of constructing a dam on Walker River to conserve its water for irrigation (R. 393-400, 498). Pursuant to this authorization a report was made recommending among other things that a storage reservoir be created for the reservation (R. 400-401, 498). It does not appear that any action was taken on this report."

As we have set out in our Statement of the Evidence this reservoir was built after the evidence in this case was closed. Because we feel the Court should have this information we are setting out an acknowledged statement by Harold L. Ickes, Secretary of the Interior with regard to the storage reservoir for the Walker River Indian Reservation lands.

" FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS
WASHINGTON

To Whom It May Concern:
This is to certify that:

1. "The undersigned, as Administrator of the Federal Emergency Administration of Public Works, did, on September 9, 1933, include in the comprehensive program of public works a project for the construction of the Walker River Storage Dam located in the State of Nevada and did allocate to the Department of the Interior, Bureau of Indian Affairs, the sum of $130,000 to finance the construction of such project.

2. "On January 1, 1935, the undersigned, as Administrator of the Federal Emergency Administration of Public Works, did approve an amendment reducing the allotment for such project by $1,300, leaving a net allotment of $128,700.

3. "On February 7, 1935, the undersigned, as Administrator of the Federal Emergency Administration of Public Works, did approve a further amendment increas-

ing the allotment for such project by $15,000, making a net allotment of $153,700.

4. "There is on file, in the offices of the Federal Emergency Administration of Public Works, Washington, D. C., a report made to said Administrator for the month ending November 30, 1935, signed by William Zimmerman, Jr., Assistant Commissioner, Bureau of Indian Affairs, Department of the Interior, showing that such project was completed June 30, 1935.

Washington, D. C., Jan'y. 16, 1939.

Harold L. Ickes
Administrator. "

"

Sworn to and subscribed before me this 16th day of January, 1939.

Ellen L. Ward
Notary Public

(Seal)

Commission expires December 15, 1943"

Due service and receipt of a copy of the within is hereby admitted this 30th *day of January, 1939.*

Roy W Stoddard

Attorney for Appellant.

Special Asst to the Attorney Gen
one of attorneys for appelle

No. 8779

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA

REPLY BRIEF FOR THE UNITED STATES

CARL McFARLAND,
Assistant Attorney General.
ROY W. STODDARD,
C. W. LEAPHART,
Special Assistants to the Attorney General.
THOMAS HARRIS,
ROBERT KOERNER,
Attorneys, Department of Justice,
Washington, D. C.

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In the United States Circuit Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE UNITED STATES

STATEMENT

The appellees not being in entire agreement with the statement of facts made by the Government (Gov't Br. 3–15) have included in their brief (Br. 2–15) a complete statement of their view of the evidence. It is believed that much of the matter the appellees have set out is immaterial to a decision of this case, and that many of their statements are further objectionable in that they either have no support in the record whatsoever or are founded upon conflicting evidence as to which the district court made no findings.

A considerable part of the appellees' statement relates to irrigation conditions upon the Walker River Indian Reservation and in the Walker River basin generally (Br. 2–6). They describe the topography of the river basin, the insufficiency of water during certain seasons to meet the requirements of the cultivated lands, and their own storage of water to prevent waste (Br. 2–4). They assert that even under normal conditions no water would reach the Walker River Reservation during certain months of some years, that there is considerable loss of water in transit between their lands and the reservation, and that, due to these losses, the acreage that can be irrigated on the reservation with a given amount of water is less than the acreage that can be irrigated upstream (Br. 5).

The chief objection to this portion of the appellees' statement is that it has no relevance to the issues presented to this court upon this appeal. Appellees apparently believe that it will assist them to defeat the rights of the Indians if they can show that they could make better use of the water than could the Indians, or that to require them to recognize the Indians' rights would cause them loss disproportionate to the gain to the Indians. Such considerations are not relevant even between ordinary private appropriators. As said in *Tonkin* v. *Winzell,* 27 Nev. 88, 100, 73 Pac. 593, 595 (1903):

> * * * we cannot sanction a policy which inevitably would result in depriving the

> prior and lower appropriator for the benefit of the later claimant nearer the head of the stream, because the latter would have a greater quantity of water, and consequently more benefit, and would save the seepage and evaporation occasioned by the flow further down to the lands of the earlier settler.
>
> The enforcement of such a doctrine would overthrow the long, well-established, and just principles of the law, and result in legal confiscation.[1]

Even if such considerations were pertinent between private individuals, they could not be invoked against water rights of Indians. See *United States* v. *McIntire* (C. C. A. 9, January 31, 1939); *Conrad Investment Co.* v. *United States,* 161 Fed. 829, 831–832 (C. C. A. 9, 1908).[2]

Appellees stress (Br. 5) the finding of the district court (R. 495–496) that "Even under nat-

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[1] See also Wiel, The Pending Water Amendment (1928) 16 Calif. L. Rev. 169, 185; Long, Irrigation (2 ed. 1916), sec. 129.

Recent California decisions, pursuant to an amendment to the state constitution prescribing "reasonable use" of water, permit in some circumstances what amounts to condemnation of a water right by one able to make better use of the water, upon payment of damages (i. e., compensation). See *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 374–375, 380, 40 P. 2d 486 (1935); Wiel, Fifty Years of Water Law (1936) 50 Harv. L. Rev. 252; Wiel, The Pending Water Amendment (1928) 16 Calif. L. Rev. 169. No such doctrine has been urged or could be entertained in this case, or in any case involving federal, or perhaps interstate, interests. See *Peabody* v. *City of Vallejo*, 2 Cal. 2d 351, 366, 40 P. 2d 486 (1935).

[2] See *infra*, pp. 29–30.

ural conditions, that is, without upstream diversions, the water would not, in some years of low flow, reach the lands of the Reservation by the end of July by reason of seepage and high evaporation loss." It is true that if all the water of the river would *always* be lost by seepage and evaporation before it reached the reservation the appellees' diversions would never injure the Indians, and the latter would have no cause of action. But there is no contention that such is the situation—all that is claimed is that in some months in dry years the diversions will not injure the Indians. Assuming that the Indians have a right only to so much water (up to 150 cubic feet) as would reach the reservation under natural conditions, and that the appellees are entitled to a decree directing the water master to permit them to divert water at any time when, under natural conditions, no water would reach the reservation,[3] the burden of proving to the

[3] This assumption posits to the Indians rights in the river less than those which the law actually accords to them. They are entitled not only to the water, up to 150 feet, which would reach the reservation under natural conditions, but to the maintenance of the water table below the river bed as it would be maintained by the full flow of the river under natural conditions. And they are entitled that the water table be so maintained even in periods when no water would reach the reservation, in order that when the flow of the river is subsequently augmented water will reach the reservation as soon as it would under natural conditions, instead of being absorbed by an unnaturally dry river bed and an unnaturally low water table. See Wiel, The Pending Water Amendment (1928) 16 Calif. L. Rev. 169, 185–191; Wiel, Law of Underground Water (1929) 2

water master that any particular diversion proposed would not injure the Indians would always be on the appellees. *Peabody* v. *City of Vallejo,* 2 Cal. 2d 351, 381, 40 P. 2d 486 (1935); 1 Wiel, Water Rights (3d ed., 1911), sec. 299, p. 310. And since the appellees have objected (Br. 67) to the form of decree suggested by the Government as "so indefinite as to destroy the values of all the lands of the Appellees," it is hardly to be supposed that they mean to suggest a decree based on a hypothetical normal flow under hypothetical normal conditions.

Some of appellees' statements as to irrigation conditions are made with respect to matters as to which the district court made no findings and as to which the evidence was conflicting. Appellees say, for instance (Br. 5, paragraph 2), that by reason of evaporation and seepage losses in the lower reaches of the river the irrigation of each additional acre of land on the reservation would require water sufficient to irrigate two acres of land upstream, and that the white settlers would be deprived of water to that extent. The district court made no findings with respect to this matter, and while the assertion of the appellees is supported by some testimony there is also testimony to the contrary. For example, appellees' witness, J. I. Wilson, the president of the Walker River Irrigation District, estimated that the amount of water neces-

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So. Calif. L. Rev. 358, 363; Wiel, Fifty Years of Water Law (1936) 50 Harv. L. Rev. 252, 261–265.

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sary to irrigate 10,000 acres on the reservation would be sufficient to irrigate only 12,000 or 15,000 acres up above (R. 812). See also R. 951–952.

In the footnote on page 5 of their brief, the appellees invite the Court to infer that the relief sought by the Government would turn 111,000 acres of land back to desert, destroy land values of $4,000,000, and make 3,000 white settlers dependents, while no value would accrue to the 520 Indians living on the reservation. According to the appellees' own assertion, just discussed, the 150 cubic feet of water necessary to irrigate 10,000 acres of reservation lands would irrigate only 20,000 acres upstream—not 111,000. There is testimony, moreover, that in ordinary years there is sufficient water in the river, without storage, to irrigate the upstream lands now irrigated and 10,000 acres on the reservation besides (R. 951–952). And while the decree sought would establish the right of the Indians to 150 cubic feet of water as a maximum, they would at no time receive a greater flow than they could apply to beneficial use on the reservation lands. Only about 2,100 acres of reservation land are now under irrigation (R. 246, 496), and the full 150 cubic feet per second can not be applied to a beneficial use until much more land has been brought under irrigation. Furthermore, the storage dam recently built for use in connection with the reservation (Appellees' Br. 12, Appendix C) will presumably enable the Indians to irrigate their

lands with less direct flow water than would otherwise be required.

Appellees (Br. 6) question the Government's assertion that there are 10,000 acres of irrigable land in the reservation. It is true that the district court made no finding upon this matter, doubtless because it was irrelevant in the view the district court took of the case, and if the case is reversed the district court should be directed to make a finding as to the total irrigable acreage upon the reservation.[4]

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[4] The testimony as to the amount of irrigable land on the reservation varies widely. Mr. Kronquist and Mr. Stevens, witnesses for the United States, testified that 10,000 acres are irrigable (R. 614, 616, 627, 633, 634, 636, 644, 655, 932, 950, 956) except in exceptionally dry years (R. 644, 956–957). Mr. Beemer reported between 6,000 and 7,000 acres irrigable in 1918 or 1919 (R. 857). Mr. Taylor, for the appellees, testified that water would be available for the irrigation of 10,000 acres during only a small part of the season, and that in many years, due to the shortage of water, not more than 2,000 to 3,000 acres could be practicably irrigated (R. 684, 704–705, 712, 721). Other witnesses for the appellees testified that 10,000 acres could not be irrigated without storage facilities (R. 793, 813, 818). The number of irrigable or arable acres is said in other parts of the record to be 1,200 acres (R. 764); 3,000 acres (R. 757, 759); 4,000 acres (R. 593, 972); 6,000 acres (R. 966); 20,000 acres (R. 961). These differences, and especially those between the Government's and appellees' witnesses, apparently result from lack of common definition of the term "irrigable." Since the purpose of determining the irrigable acreage in this case is to determine the maximum amount of land for which the United States may divert water, considering the possible future needs of the Indians (Gov't Br. 57–61), the term "irrigable land" should include all land susceptible

Appellees assert that in 1859 and thereafter the Pahutes were at war with the whites (Br. 8, 36). This assertion is directed at the statement of the Government (Br. 32, note 8), "that the creation of the reservation had at least the tacit consent of the Indians." As stated in the Government's opening brief (Br. 32), the United States undoubtedly has the power to create a reservation and assign Indians to it regardless of their consent. The hostitlity or friendliness between the Indians and the United States is therefore immaterial. (See also *infra,* pp. 30–31.)

Furthermore, the appellees' assertion has no support in the record. While the record shows

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of agricultural use that is practicably accessible to water from the Walker River. *Cf. United States* v. *Conrad Investment Co.*, 156 Fed. 123, 130 (C. C. D. Mont., 1907), 161 Fed. 829, 833 (C. C. A. 9, 1908); *United States* v. *Hibner*, 27 F. 2d 909, 911 (D. Idaho, 1928). Whether the amount of water in the river under normal conditions is sufficient to irrigate all the available arable lands of the reservation in all seasons is irrelevant to the question of the extent of irrigable lands, but relates instead to the proposition, heretofore discussed, that the Indians are only entitled to so much water as would reach the reservation under natural conditions, regardless of the quantity of irrigable land in the reservation. In this light the testimony of appellees' witnesses, who estimated the irrigable acreage of the reservation at a low figure because of the shortage of water in certain seasons, is entirely reconcilable with that of the Government's witnesses, and the preponderance of the evidence is that there are 10,000 acres of irrigable land. The widely variant figures stated in the last-cited portions of the record are for the most part unreliable since they represent casual estimates made under varying definitions.

hostilities between Indians and whites in Nevada in 1859 and later, nothing in the record or in the sources relied upon by the district court in its first opinion (R. 396–398) shows that the Pahutes of the Walker River Reservation engaged in these hostilities. The assault on Williams Station in May 1860 was made by Pyramid Lake Pahutes, Bannocks, and Pit River Indians (R. 574–575). The letter of August 29, 1860, from the Secretary of the Interior to the Secretary of War, asking the assistance of the United States troops, relates to difficulties with the Pyramid Lake Pahutes (R. 576). The letter of November 22, 1861, from General Wright to Governor Nye concerning protection for the overland mail route does not show hostilities on the part of the Walker River Indians (R. 738). The Governor writes that although the Indians were "testy and uneasy," his Indian Agent had gone among the Pahutes and found them "all quiet" (R. 602). The letter of Governor Roop of Nevada Territory, of February 12, 1860, to General Clarke, recites the murder of eight white men by Pahutes but does not indicate that the Walker River Indians were involved (R. 770–772). The quotation from Thompson and West (R. 773–775) refers to a proposed assault by a large body of Indians upon Fort Churchill in 1861. The Indians assembled near the mouth of the Walker River, but the assault was averted by Wasson, then acting Indian Agent, who "by argument and persuasion" diverted the Indians from the attempt.

Involved in this plot were "Bannocks from Idaho and Oregon, and representatives of the Pah-Utes from far and wide." There is no direct showing that the Walker River Reservation Indians were involved and the history states that those from the most isolated places were most intent on commencing the raid.

So far from showing a state of war between the Pahutes and the whites, the portions of the record relied upon by appellees amply support the view that the Pahutes were anxious to secure peace (R. 574, 576, 585–586, 592, 602, 754). The letter of June 23, 1860, from Indian Agent Dodge to the Commissioner of Indian Affairs reports that the Walker River Reservation Indians were friendly and promised not to join the hostiles, against whom they asked protection (R. 585). In 1865 Indian Agent Campbell wrote the Commissioner that the Walker River Indians would never again wage war with the whites unless some flagrant act of injustice was done them. He stated that the Walker River Valley above the reservation was settled with a class of men so embittered against the Indians that "they are doing everything in their power to get the Indians into a war for the purpose of getting them exterminated" (R. 592–593). A report made in 1862 by the Executive Department of Nevada Territory to the Secretary of the Interior and by him sent to Congress, reports disturbances among the Owens River Indians in

California and the fear and uneasiness of the Pahutes lest they themselves might become involved in the difficulties (R. 603). The report of the Superintendent of Indian Affairs of Nevada to the Commissioner in 1866, says of the Pahutes, "Upon the whole, they have been peaceable, have yielded readily to the will of the Government, and are now cheerfully obedient to its laws" (R. 754).

In recognition of the fact that peace could be preserved if the Indians were given a tract of land for their exclusive occupancy, steps were taken to exclude trespassers from the reservation (R. 576–577, 585–586). While the Government found it necessary, as stated by the appellees (Br. 8), to supply the Indians with food, blankets, clothing, and fancy articles, this was done in the belief that the Indians would soon become prosperous and happy and the agency be made self-sustaining (R. 587, 588–589, 591, 599). The early letters of the Indian Agent and the conference between the Indian Chiefs and Governor Nye, cited from the record by the Government (Br. 9), and reviewed by appellees (Br. 8), together with the above facts, show the purpose of the Government, in creating the reservation in 1859, that the Indians should live upon it and sustain themselves. While the record tends to show that the Indians at first sustained themselves from the natural products of the soil, and that the abundance of these products was a material factor in the selection of the res-

ervation, the Government cannot have intended, in its awareness of oncoming civilization, that the perpetual fare of the Indians would be pine nuts, roots, and fish, nor that the Indians would be forever reliant upon the Government for their clothing and supplies. The persistence of the Indian Agents, and, in fact, of all the governmental authorities who had occasion to survey the condition of the Pahutes in the Walker River Valley, in recommending that they be furnished tools and supplies and be taught to farm, clearly indicates that the Government did not so intend. So, too, do the numerous acts of Congress appropriating money for "presents of goods, agricultural implements, and other useful articles, and to assist them to locate in permanent abodes, and sustain themselves by the pursuits of civilized life." See, for example, the Act of March 3, 1863, c. 99, 12 Stat. 774, 791, and others cited *infra,* p. 27.

The statements of the appellees on pages 9 and 10 of their brief are directed to showing that cultivation on the reservation was not extensive and that the effort to teach the Indians to farm was not very successful, for lack of agricultural implements and for lack of ability or desire on the part of the Indians. But the water rights of the Indians rest on the facts that the reservation was created and the Indians placed thereon for their civilization and self-sustenance, and that the water of the Walker River was necessary to accomplish

that purpose, and not upon their immediate success or failure in cultivating the reservation.[5]

Appellees have referred in their brief (Br. 12) and in Appendix C, to the fact that a small storage reservoir has been built by the Government for the irrigation of the reservation. Assuming that this information is properly before this Court,[6] it does not affect the case. The Indians' direct flow rights obviously are not affected by the acquisition of storage facilities for them.

ARGUMENT

I

The United States, by the creation of the Walker River Indian Reservation, impliedly reserved for the Indians sufficient water of the Walker River for the irrigation of the irrigable lands of the reservation

A. The United States, when it created the Walker River Indian Reservation, had power to reserve water for the irrigation of the lands of the reservation

In answer to the Government's contention that the United States, by the creation of the Walker River Indian Reservation, impliedly reserved for the Indians sufficient water of the Walker River for the irrigation of the irrigable lands of the reser-

[5] The record shows, moreover, that the failure of the Indians to cultivate their land more extensively was due in large part to the lack of water in July and subsequent months (R. 652–653), and that this lack of water resulted largely from upstream diversions (R. 963).

[6] That it is not, see *United States* v. *Knight's Administrator*, 1 Black 488, 489; *Russell* v. *Southard*, 12 How. 139, 158–159; *Roemer* v. *Simon*, 91 U. S. 149.

vation, appellees argue (Br. 16–25, 35–36, 48–50, 53) that Congress, by statutes enacted in 1866, 1870, and 1877, and by the admission of the western States to the Union "has relinquished control over the waters of western streams," and that the water rights of the Indians in this case must be determined by the local law of California and Nevada. Appellees also argue (Br. 29) that the power of the United States to reserve water for Indians rests on the treaty power, and that it cannot be exercised in a State after its admission to the Union.

The answer to these contentions is that the reservation was created in 1859, and that even assuming that control over the water of western streams passed to the States upon their admission to the Union, or by the statutes enacted in 1866, 1870, and 1877, the United States had power in 1859 to reserve water for the irrigation of the reservation.

1. *The reservation was created in 1859.*—The facts as to the creation of the reservation are set out in the Government's opening brief, pp. 7–8. That the steps there related were effective to create the reservation in 1859, as both the master (R. 258–260) and the district court (R. 392) held, is clear.

In *Northern Pac. Ry. Co.* v. *Wismer,* 246 U. S. 283, the Supreme Court held that an Indian reservation had been validly created by administrative action very similar to that which was taken in the case of the Walker River Indian Reservation.

In the *Wismer* case the United States granted to a railroad company land within a certain distance of each side of the railroad line which was "not reserved, sold, granted, or otherwise appropriated" at the time the line of the railroad was definitely fixed. The railroad line was definitely located in October 1880, and the question was whether certain land otherwise within the grant had been validly set aside as an Indian reservation before that date. The creation of the reservation rested on the following facts: In 1877 Colonel Watkins, described as an Indian inspector, together with an army officer, had, without specific prior authorization, signed an agreement with an Indian tribe setting aside the reservation for the tribe. In the same year Colonel Watkins reported the agreement to the Commissioner of Indian Affairs, and recommended that the described territory be reserved for the tribe. Later the same year Colonel Watkins moved onto the reservation such Indians of the tribe as were not already there, and reported this action to the Commissioner of Indian Affairs who approved it and communicated it to the Secretary of the Interior, who, in turn, communicated it to the Senate in 1878. In September 1880, an army officer in the field issued an order directing the military force under his command to protect the reservation against settlement by settlers until survey or until further instructions. In January 1881 the President, by executive order,

formally set aside and reserved the territory for the Indians.

The Supreme Court held that the reservation was validly created at least as soon as January 1878 when the Secretary of the Interior indicated his approval of the creation of the reservation by sending the report of Colonel Watkins to the Senate. The Court said (246 U. S. 283, 287–288):

> The plaintiff in error concedes, as it must, that if the Secretary of the Interior approved the action taken by Colonel Watkins prior to the filing of the plat of its line on October 4, 1880, the reservation must be considered as lawfully established and the lands thereby removed beyond the scope of the grant to the Railroad Company. (*Wilcox* v. *Jackson,* 13 Pet. 498, 512; *Wolsey* v. *Chapman,* 101 U. S. 755, 769; *Wood* v. *Beach,* 156 U. S. 548; *United States* v. *Midwest Oil Co.,* 236 U. S. 459; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States,* 244 U. S. 351, 357.) And reservations made by heads of bureaus, such as the Commissioner of the General Land Office, or the Commissioner of Indian Affairs, in the administration of the matters committed to their charge, stand upon the same footing where the Secretary of the Interior is informed of their action, and where, as in this case, he either expressly or tacitly approves the same. *Spencer* v. *McDougal,* 159 U. S. 62.
>
> Such being the law, we cannot doubt that the sound inference from the stipulated facts as we have stated them is that, with

> full understanding of the situation the Secretary of the Interior and the Commissioner of Indian Affairs approved the action of Colonel Watkins not later, certainly, than the sending of his report to the Senate on January 23, 1878, which was almost three years prior to the filing of the railway company's plat, and that the Executive Order of the President on January 18, 1881, simply continued and gave formal sanction to what had been done before.

In addition to the decisions cited in the above quotation, see *Minnesota* v. *Hitchcock,* 185 U. S. 373, 389–390, where it was said:

> Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

And see *Donnelly* v. *United States,* 228 U. S. 243, 257; *Wilbur* v. *United States,* 46 F. 2d 217, 219–220 (App. D. C., 1930); *Belt* v. *United States,* 15 Ct. Cl. 92, 107–108 (1879).

In 45 L. D. 502 (1916), the Department of the Interior, ruling upon a conflict similar to that in the *Wismer* case, formally held that the Pyramid Lake Reservation, which was created at the same time and by the same steps as was the Walker River Reservation, was validly established in 1859. The opinion states (p. 503):

> It is well settled that the acts of the heads of Departments must be held to be the acts

> of the President [citing cases]. The subsequent order of the President therefore was unnecessary for the purpose of establishing the reservation, and merely recognized and declared what had already been done.[7]

Appellees (Br. 38–39) treat the question as one of ratification, or relation back, and argue that the executive order in 1874 could not validate the creation of the reservation as of 1859 so as to cut off intervening rights. But no such issue is involved. The question is whether the action of the administrative officials in 1859 was effective to create the reservation at that time, and the authorities which have been cited show conclusively that it was. The executive order, as the Supreme Court said in the *Wismer* case (246 U. S. 283, 288), "simply continued and gave formal sanction to what had been done before." There were no intervening rights to be cut off.

2. *Even assuming that control over the water of western streams passed to the States upon their admission to the Union, or by the statutes enacted in 1866, 1870, and 1877, the United States had power*

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[7] The opinion further states:

"This matter was before the Department in 1891, and Assistant Attorney General Shields rendered an opinion thereon July 7th of that year to the effect that the lands included in the Pyramid Lake Indian Reservation were excepted from the grant to the Central Pacific Railway Company. This opinion was forwarded by the Secretary of the Interior to the Indian Office with directions that it be guided thereby in its actions in connection with the reservation" (45 L. D. 502, 504).

in 1859 to reserve water for the irrigation of the reservation.—It is self-evident that the statutes of 1866, 1870, and 1877 have no bearing on the power of the United States to reserve water for the reservation in 1859. While the first opinion of the district court discusses these statutes, and particularly the act of 1877 (R. 403–410), it concedes (R. 410) that if water was reserved in 1859 that reservation of water was not affected by the subsequent statutes, since they did not affect existing rights.

Nor did the admission of Nevada and California to the Union defeat the reservation of water in 1859, even assuming that control over the disposal of the water passed to those States upon their admission.[8] Nevada was not admitted to the Union until 1864 (Presidential Proclamation of October 31, 1864, 13 Stat. 749). While California was admitted in 1850, it is clear that its admission did not, for two reasons, defeat the power of the United States to reserve water for the reservation in 1859.

In the first place, while the United States held the territory which later became the State of Ne-

[8] It is clear from the opinion of the Supreme Court in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U. S. 142, that control over the disposal of water of the streams of the public domain did not pass to the States by virtue of their admission to the Union, but remained in the United States at least until the statutes of 1866, 1870, and 1877. Speaking of the situation before the enactment of those statutes the Court said in that case (p. 162):

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately."

vada, it was entitled, as against California, to control the disposal of that portion of the water of the Walker River equitably allocable to the territory then under its control, under the principles of interstate water adjudication since enunciated by the Supreme Court.[9] No suggestion has been made—or is likely to be made in view of the extensive water rights awarded to Nevada lands in this suit—that the quantity of water reserved for the reservation exceeded the amount allocable to the territory held by the United Sates in 1859.[10]

In the second place, California did not, in 1859 or thereafter, assert any power to control the disposal of rights in the waters of the streams of the public domain in that State, but, on the contrary, expressly recognized the authority of the Federal Government in that field. In the leading case of *Lux* v. *Haggin,* 69 Cal. 255, 336 ff., 10 Pac. 674 (1886), the Supreme Court of California held that the United States had power to dispose of the waters of non-navigable streams of the public do-

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[9] See *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 101, 108, 110; *Arizona* v. *California*, 298 U. S. 558, 568; *New Jersey* v. *New York*, 283 U. S. 336, 342, 343; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669–671; *Wyoming* v. *Colorado*, 259 U. S. 419, 465, 470; *Kansas* v. *Colorado*, 206 U. S. 46, 97, 98; *Missouri* v. *Illinois*, 200 U. S. 496, 519–520; *Kansas* v. *Colorado*, 185 U. S. 125, 146.

[10] That such a question is open to determination in a suit to which the interested States are not parties, see *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110–111, and cases there cited.

main. The court said that by the Mexican law non-navigable streams were public property; that it might be claimed that this property became vested in the State of California upon its admission to the Union as an incident to the sovereignty, but that in 1850, shortly after the admission of the State, California passed an act, relating back to the time of its admission, adopting the common law, and that that act:

> should now be held to have operated (at least from the admission into the Union) a transfer or surrender to all riparian proprietors, of the property of the state—if any she had—in innavigable streams and the soils below them.

And the court went on to say (p. 338):

> And from a very early day the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California

as the owner of innavigable streams and their beds. And since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.[11]

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[11] In Cal. Stat. 1911 (California Civil Code (Deering, 1937) sec. 1410) the California Legislature provided:

"All water or the use of water within the state of California is the property of the people of the state of California."

In *Palmer* v. *Railroad Commission*, 167 Cal. 163, 138 Pac. 997 (1914), the Supreme Court of California nevertheless reaffirmed the doctrine of *Lux* v. *Haggin*, that the United States was the owner and had control over the disposal of waters of the public lands except as by the act of 1866 and later statutes it had permitted rights in such waters to be acquired as provided by the laws of the States. Referring to the statute above quoted, the court said, on rehearing (p. 175):

"All the water-rights which were in dispute in the case arose and were acquired by and under appropriations made long before the passage of the amendment aforesaid. It ought not to be necessary to remind any one that a law of this character is not retroactive, or that it cannot operate to divest rights already vested at the time it was enacted. The amendment may possibly be effective as a dedication to general public use of any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such cases have in common with owners of other abutting land."

Even if it could be assumed that the State courts were incorrect in attributing to the United States title over the waters of the public domain and the control over their disposal, it is plain that the California statutes and decisions operated as a grant of such control to the United States, and as a recognition of all water rights derived from the United States. To hold otherwise would invalidate nearly every water right in California. And that the California statutes and decisions did operate as a grant to the United States of power to dispose of the water of the public domain is clear from the decision of the Supreme Court in *Donnelly* v. *United States,* 228 U. S. 243. In that case the question was whether an Indian reservation included the bed of a river which flowed through it. The doctrine which had been established by the adjudicated cases, cited in the *Donnelly* case, was that title to the beds of navigable streams passed to the States upon their admission to the Union, while title to the beds of non-navigable streams remained in the United States. As the reservation involved had been created subsequent to the admission of California to the Union, it was contended that if the river was navigable the reservation could not include the bed of the river, as the United States would have had no power to grant it to the Indians. The Supreme Court rejected this argument. It said that California had by statute classed the river in question as non-navigable and

that by the decision in *Lux* v. *Haggin,* referred to above, the Supreme Court of California had recognized that the title and power of disposal over the waters and beds of non-navigable streams was in the Federal Government. The Supreme Court said (p. 264):

> The authority of this decision was recognized in *Packer* v. *Bird,* 137 U. S. 661, 669. We are not able to find that the doctrine declared in it has since been departed from by the courts of the State.

And the Court went on to hold that by the statute and decision California had vested in the United States the title to the bed of the river if it were in fact navigable, and that if it were in fact non-navigable the same result would follow from the mere adoption of the common law. It is clear, therefore, that as far as California was concerned the United States had authority to make the reservation of water in 1859.

B. From the facts and circumstances attending the creation of the Walker River Indian Reservation it is to be implied that the United States reserved water for the irrigation of the reservation

1. *This case is governed by the principle of the Winters case.*—The appellees do not succeed, on pages 25–54 of their argument, in distinguishing on its facts the case of *Winters* v. *United States,* 207 U. S. 564. The several circumstances which they have set out (Br. 26–27) as the basis for their contention that the *Winters* case is inapplicable here

either are immaterial or depend on facts which exist in this case as well as in the *Winters* case. They say, for example:[12]

> b. That prior to the creation of the reservation [in the *Winters* case], the Indians of the Fort Belknap Reservation occupied a much larger tract of land which had been previously set aside as a reservation by an Act of Congress, which larger tract was deemed adequate for their wants in the light of their habits as a nomadic and uncivilized people.

This was one of several circumstances surrounding the creation of the Fort Belknap Reservation from which the Supreme Court concluded that a right to water for irrigation was impliedly reserved to the Indians (207 U. S. 576). Following its statement of this fact, the Court said:

> It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid

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[12] As their first distinction between this and the *Winters* case the appellees set out:

a. That the Fort Belknap Reservation of Montana was created pursuant to formal agreement or treaty between the United States and the Indians of the Fort Belknap Reservation, which treaty was ratified by Congress.

This purported distinction is discussed *infra*, p. 32ff.

> and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

The record indicates that the Pahutes in this case, before the Walker River and Pyramid Lake Reservations were created for them, inhabited at large the region of Utah Territory.[13] The Walker River and Pyramid Lake Reservations were set apart from Pahute country in the Territory of Utah and the United States took possession of the remainder of this country without formal relinquishment by the Indians. See Royce, Indian Land Cessions in the United States, 18th Ann. Rep. Bureau of Eth-

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[13] In recommending the creation of the reservations in 1859, Dodge, the agent for Indians in Utah Territory, wrote (R. 569–570):

"Yesterdays overland mail brought me advices from Carson Valley that there was a general stampede of persons from California to the mining localities within my agency which devolves on me additional reasons for appealing to your kind consideration in behalf of my Indians, and to the immediate necessity of reserving a sufficient portion of their lands to enable them to sustain life.

* * * * *

"The Indians of my Agency linger about the graves of their ancestors—'but the game is gone,' and now the steady tread of the white man is upon them. The green valleys too, once spotted with game 'are not theirs now.' * * *

"I sincerely hope that those asylums will be made for them, where they can be free from the influence of the 'White Brigands' who loiter about our great overland mail and emigrant routes—using them as their instruments to rob and plunder our citizens."

nology, 56th Cong., 1st Sess., H. R. Doc. No. 736, pp. 872–873. It was the policy of the United States to teach the Pahutes civilized ways and how to sustain themselves by the cultivation of the soil, and to help them establish permanent homes.[14] And it was its purpose, in creating the Walker River and Pyramid Lake Reservations, as it was in creating the Fort Belknap Reservation, to confine the Indians to a smaller tract than they formerly claimed or occupied, in order to fulfill this governmental policy of transforming the Indians into a settled agricultural people. And the Walker River Reservation, like the Fort Belknap Reservation, was arid

[14] Compare *Winters* v. *United States*, 143 Fed. 740, 745 (C. C. A. 9, 1906). This policy appears in appropriations for general incidental expenses of the Indian service in Utah Territory, including agricultural implements, Act of June 12, 1858, c. 155, 11 Stat. 329, 330; Act of June 19, 1860, c. 157, 12 Stat. 44, 58, and including also stock cattle and the erection of houses, Act of March 2, 1861, c. 85, 12 Stat. 221, 237. Also in numerous appropriations for the Indian service in Nevada Territory, and later in the State of Nevada for "presents of goods, agricultural implements, and other useful articles, and to assist them to locate in permanent abodes, and sustain themselves by the pursuits of civilized life." Act of March 3, 1863, c. 99, 12 Stat. 774, 791; Act of June 25, 1864, c. 148, 13 Stat. 161, 179; Act of March 3, 1865, c. 127, 13 Stat. 541, 558; Act of July 26, 1866, c. 266, 14 Stat. 255, 279; Act of July 28, 1866, c. 297, 14 Stat. 324, 326; Act of March 2 ,1867, c. 173, 14 Stat. 492, 512; Act of July 27, 1868, c. 248, 15 Stat. 198, 220; Act of April 10, 1869, c. 16, 16 Stat. 13, 36; Act of July 15, 1870, c. 296, 16 Stat. 335, 357; Act of March 3, 1871, c. 120, 16 Stat. 544, 567; Act of May 29, 1872, c. 233, 17 Stat. 165, 187; Act of February 14, 1873, c. 138, 17 Stat. 437, 460; Act of June 22, 1874, c. 389, 18 Stat. 146, 171; Act of March 3, 1875, c. 132, 18 Stat. 420, 445.

and practically valueless unless means of irrigation were provided (R. 390, 496, 626, 683).

Appellees' next differentiation of the *Winters* case is:

> c. That the treaty was entered into while Montana was a territory, and the land was Indian country.

This fact is relevant only to the question whether the creation of the States deprived the United States of power to reserve water rights to the Indians. That the United States had power in 1859 to reserve water rights under the laws of the State of California as well as in the Territory of Utah is shown, *supra,* pp. 13–24.

Appellees next say:

> d. That the Indians [in the *Winters* case] had appropriated the amount of water involved, and had applied it to beneficial use before the alleged illegal diversions of the defendants.

The Court noticed, in stating the facts in the *Winters* case (207 U. S. 564, 566), that certain quantities of water had been appropriated by the United States and the Indians before the defendants' appropriations occurred. But the Court placed no reliance on this fact in its opinion. If the early appropriations by the United States and the Indians had been a legally sufficient ground on which to sustain the right of the Indians to enough water for the irrigation of the reservation lands, the Court would not have deemed it necessary to

find an implied reservation of water rights from the facts and circumstances surrounding the creation of the Fort Belknap Reservation. The reason which underlies the implication of a reservation of water rights is found in the inability of the Indians to care for themselves, their resultant dependency upon the Government which has assumed a status of guardianship toward them, and the duty of the Government in the execution of its guardianship. This reason is inconsistent with any view that the water rights of the Indians depend upon appropriation. As stated by the court in *United States* v. *Conrad Investment Co.,* 156 Fed. 123, 129–130 (C. C. D. Mont., 1907), aff'd 161 Fed. 829 (C. C. A. 9, 1908):

> Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art. The government, however, being their guardian, has a most important trust to perform in this relation; that is, so to conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I may say, even possible future needs, when they have ultimately secured their allotments in severalty.
>
> * * * * *

> The Government has not to make a prior appropriation to enable it to obtain the use of the water. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain.

Cf. *United States* v. *Hibner,* 27 F. 2d 909, 910–911 (D. Idaho, 1928).

Appellees say:

> e. That by this treaty the Indians agreed to occupy the reservation as a permanent home.

The record shows that the Walker River Reservation was selected for the Indians with a view to "reserving a sufficient portion of their lands to enable them to sustain life" (R. 569); that it would "have the advantage of being their home from choice," and that it was to be an asylum for the Indians, where they could be free from the influence of the "White Brigands" who loitered about the overland mail and emigrant routes (R. 570). It was repeatedly emphasized that the welfare of the whites as well as that of the Indians depended upon the isolation of the Indians upon a tract set apart for their exclusive use (R. 571, 575–577, 582–583, 584, 585–586, 587–588, 590–591, 592–593, 602, 603, 605). Whether or not the Walker River Pahutes agreed to occupy the reservation as a permanent home, they apparently did so occupy it, without objection. In any event the power of the United States to assign them to a

reservation set apart for their use and occupancy was not dependent on their consent. *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 486, 488; *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 564; *United States* v. *Rickert,* 188 U. S. 432, 437, 443; *Sizemore* v. *Brady,* 235 U. S. 441, 447, 449; *United States* v. *Rowell,* 243 U. S. 464, 468. The general policy of the Government to teach the Indians civilized ways and the means of sustaining themselves by the cultivation of their reservations is undoubted. And the record amply shows the intention of the United States to execute this same policy in relation to the Indians it placed on the Walker River Reservation (Gov't Br. 9; *supra,* p. 27).

Appellees' final distinction of the *Winters* case is:

> f. The Indians were found by the Court to have been deprived of sufficient water to carry on agriculture under their changed conditions of living outlined in the treaty, and it was urged that, by reason of the treaty, there was an implied agreement on the part of the United States to reserve with the land, waters for the irrigation of the diminished area by the treaty.

The United States contends, and the appellees nowhere deny, that the water remaining in the Walker River after the diversions of the appellees is insufficient for the Indians of the reservation to support themselves by agriculture. And it is, of

course, urged that, by the creation of the reservation with the intention that the Indians thereon should sustain themselves by agriculture and learn civilized ways, the United States impliedly reserved to the Indians water for the irrigation of the reservation.

2. *Whether a reservation was created by treaty, executive order, or by other means is not determinative of the question whether water rights were reserved for the Indians.*—Of the several factors which the appellees seek to establish as distinguishing this case from the *Winters* case, they emphasize most strongly the following:

> a. That the Fort Belknap Reservation of Montana was created pursuant to formal agreement or treaty between the United States and the Indians of the Fort Belknap Reservation, which treaty was ratified by Congress.

The notion that a reservation of water can arise only in the presence of a formal treaty or agreement finds apparent support in the fact that most of the cases in which such a reservation has been found are cases in which there was a treaty (but cf. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78), and that when the courts have refused to find an implied reservation of water they have sometimes mentioned, among other distinguishing factors, that the *Winters* case involved an agreement with the Indians. See *United States* v. *Wightman,* 230 Fed. 277, 282 (D. Ariz., 1916).

The Court in the *Winters* case, moreover, relied in part on the canon that treaties with the Indians are to be construed in their favor (207 U. S. 564, 576–577; see also *United States* v. *Stotts,* 49 F. 2d 619, 620 (W. D. Wash., 1930)). A closer examination of the decisions discloses, however, that whether there is an implied reservation of water rights does not depend upon the existence of an agreement or an exchange of land between the United States and the Indians: it depends rather on whether the United States had power to reserve water rights, and, if it did, on whether, in the light of all of the pertinent circumstances, including the general governmental policy to civilize the Indians and assist them in the establishment of permanent homes, and including the facts as to the physical situation of the reservation in question, it is reasonably to be inferred that a reservation of water rights was intended. That the implied reservation depends upon the power of the United States in the premises, and its intention and purpose in the exercise of that power, is clear from the opinion in *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87–89 (see Gov't Op. Br. 28–29). Similarly, in *United States* v. *Powers,* 83 L. Ed. (Adv. Ops.) 321, 324, decided by the Supreme Court on January 9, 1939, the Court, in finding by implication from a treaty that sufficient waters for irrigation were reserved from the streams within the Crow Indian Reservation, did not rely upon

any doctrine of construction peculiarly applicable to treaties. It said only:

> Manifestly the Treaty of 1868 contemplated ultimate settlement by individual Indians upon designated tracts where they could make homes with exclusive right of cultivation for their support and with expectation of ultimate complete ownership. Without water productive cultivation has always been impossible.
>
> We can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes.

In *Donnelly* v. *United States,* 228 U. S. 243, 259, discussed *supra,* pp. 23–24, it was held that a reservation created by an executive order, which described the reservation as "a tract of country one mile in width on each side of the Klamath River," included the bed of the Klamath River. The Court said:

> * * * in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.

In *United States* v. *Wightman,* 230 Fed. 277 (D. Ariz., 1916), cited by appellees (Br. 41), an Indian reservation created by executive order included land on which there were certain springs. This land, as well as the land occupied by the defendant, had formerly been part of a military reservation, and the water of the springs in question had been used for domestic and agricultural purposes on the military reservation. The land when opened to entry was appraised as including the value of the spring water for irrigation, and the defendant paid for and used the water. The court held that the spring water was not reserved to the Indians. Distinguishing the *Winters* case, it said (230 Fed. 277, 282):

> The decision in that case is based solely on the agreement with the Indians and the implications which the court draws from the facts surrounding the creation of the Ft. Belknap reservation, and it is expressly stated therein that the reservation as a whole would be made unfit for the purposes for which it was created and incapable of maintaining the Indians if the waters of the Milk river were diverted as was done by the defendants.

The court found that an ample supply of water flowed from other springs on the reservation, and that the water of the springs in question was not necessary to the objects for which the reservation was created. The court said (230 Fed. 283):

> The decision [in the *Winters* case] is not an authority that the mere creation ex vi termini reserves to the Indians, or to the United States for their benefit, the beneficial use of all waters flowing within the reservation * * *.
>
> It is not alone a question of the *power* of the United States to devote these waters to the exclusive use of the Indians, but it is a question of whether it has *exercised the power.*

With this statement the Government concurs, and it concurs also in the view that to determine whether the power to reserve waters has been exercised all the surrounding circumstances, and especially the necessity of the water for irrigation, must be examined. The mere fact that the reservation is created by executive order, instead of by treaty, is not determinative.

In *Byers* v. *We-Wa-Ne,* 86 Or. 617, 169 Pac. 121 (1917), discussed by appellees (Br. 43), the court held that the water rights there in question vested in the contestants and not in the United States or the Indians: First, because Congress, by a statute passed long after the reservation was created, recognized and confirmed the contestants' right; second, because the treaty creating the reservation in 1855 did not impliedly reserve the water rights to the Indians. In discussing the second point, the court said (p. 635):

> Consideration may be given to the purposes in view and to the situation of the parties,

> but unless the implication of these water rights is found in the treaty when read in the light of these purposes and circumstances, the rights contended for must be held to be nonexistent.

The court distinguished the *Winters* case and *United States* v. *Conrad Investment Co.,* 156 Fed. 123, aff'd, 161 Fed. 829 (C. C. A. 9, 1908), on the ground that in those cases there was a manifest intent that the Indians should farm the land, and the land could not be farmed without irrigation. These factors were missing in the *Byers* case, and because the right claimed was "not essential to the maintenance of the Indians or to their progress in the arts of civilized life" the court found no implied reservation of waters.

In *United States* v. *Stotts,* 49 F. 2d 619 (W. D. Wash., 1930), cited by appellees (Br. 44), the question was whether a reservation which was created by an executive order made pursuant to a treaty with the Indians included tidelands along one side of the reservation. The court held the tidelands were a part of the reservation, since the United States had power to grant the tidelands to the Indians and since the executive order expressly defined the boundary at low-water mark. The court noted that the executive order was in accordance with the interests of the Indians and the object for which the reservation was created, since the tidelands were necessary to fishing.

In *Taylor* v. *United States,* 44 F. 2d 531 (C. C. A. 9, 1930), cited by appellees (Br. 46), the reservation was created by executive order made pursuant to treaty, and the controversy involved the title to the bed of a navigable stream. The reservation in question was created before the State was admitted to the Union, and this Court conceded the power of the United States to grant away tideland and submerged land (44 F. 2d 533). It found, however, no intention on the part of the Government to reserve for the Indians the lands covered by navigable waters, or to except the case from the general policy of the Government to hold such property in trust for the future States. *United States* v. *Holt Bank,* 270 U. S. 49, cited by appellees (Br. 45), is substantially to the same effect.

Plainly the general principle to be derived from all of these cases is that the question whether a reservation of water is to be implied is to be determined from a consideration of the power of the United States to dispose of the right, the purpose and intent for which the public lands were withdrawn, and whether a reservation of water rights is necessary to accomplish that purpose.

The appellees seek to dismiss from consideration the *Winters* case and other cases cited by the United States, on the ground that those cases rest upon the construction of a treaty (Br. 29–31). They purport to distinguish *Alaska Pacific Fisheries* v. *United States,* cited on page 27 of the Government's brief, as involving only a construction

of what Congress meant in using the words, "the body of lands known as Annette Islands" (Br. 50). But the action of the Commissioner of Indian Affairs and of the Commissioner of the General Land Office is as susceptible of construction and as needful of construction as is a treaty or statute. Statutes passed for the benefit of dependent Indian tribes or communities, as well as treaties made with them, are to be liberally construed, and doubts resolved in favor of the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89; *United States* v. *Nice,* 241 U. S. 591, 599; *United States* v. *Celestine,* 215 U. S. 278, 290; *Cherokee Intermarriage cases,* 203 U. S. 76, 94. This rule has its basis in the Government's duty of protection of a dependent people. *Choate* v. *Trapp,* 224 U. S. 665, 675; *United States* v. *Pelican,* 232 U. S. 442, 450; *United States* v. *Nez Perce County, Idaho,* 95 F. 2d 238 (C. C. A. 9, 1938). The rule of strict construction, said by the appellees to apply to grants of the sovereign (Br. 30) has no application to statutes or treaties made by the United States in relation to Indians. No valid reason is apparent why it should apply in the construction of departmental or executive conduct pertaining to the Indians.

The appellees assert (Br. 31–34, 59) that the Paiute Indians have no interest in either the lands or waters of the Walker River Reservation, whether by aboriginal occupation or by the acts of the commissioners or the executive order

of the President. But, as has been shown, it is clear that the acts of the Commissioner of Indian Affairs and of the Commissioner of the General Land Office in 1859, and the tacit consent of the Secretary of the Interior in those acts, conferred upon the Walker River Indians a right of occupancy in the Walker River Reservation. This right of occupancy was recognized by Congress in the Act of May 27, 1902, c. 888, 32 Stat. 260, which provided for the allotment of lands on the reservation,[15] and that—

> when a majority of the heads of families on said reservation shall have accepted such allotments and consented to the relinquishment of the right of occupancy to land on said reservation which can not be irrigated from existing ditches and extensions thereof and land which is not necessary for dwellings, school buildings or habitations for the members of said tribe, such allottees who are heads of families shall receive the sum of three hundred dollars each to enable them to commence the business of agriculture. * * *

Appellees (Br. 51) assert that the action of officers and department heads in charge of the

[15] The existence of the Walker River Reservation was repeatedly recognized by Congress in acts appropriating money for its maintenance. Act of June 22, 1874, c. 389, 18 Stat. 146, 147; Act of March 3, 1875, c. 132, 18 Stat. 420, 421, 422; Act of August 15, 1876, c. 289, 19 Stat. 176, 177; Act of March 3, 1877, c. 101, 19 Stat. 271, 272; Act of May 27, 1878, c. 142, 20 Stat. 63, 85; Act of February 17, 1879, c. 87, 20 Stat. 295, 314.

Walker River Reservation is conclusive that there was no intention on the part of the United States to reserve water rights when the reservation was created. They base this proposition upon the application for permit to appropriate waters of the State of Nevada, filed with the state engineer on December 24, 1910, by the Superintendent of the Walker River Reservation (Br. 51), and upon the disposition of the upstream lands by patent to the white settlers (Br. 52).[16]

The applications made by the Superintendent of the Reservation in 1910 and by the Walker River Indian agent in 1906 were admitted in evidence subject to the objection that they were not shown to have been made by the authority of any executive or administrative officer of the United States, or of Congress (R. 821–822, 824). On December 2, 1920, the Assistant Commissioner of Indian Affairs wrote the Superintendent of the Walker River School (R. 966):

> In the absence of legislation by Congress, the lands and water rights belonging to the Indians within Indian reservations are not subject to the operation of State statutes.

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[16] Although the district court treated these matters as having to do with administrative construction in its first opinion (R. 403), in its second opinion it dealt with them in connection with laches, estoppel or equitable defenses (R. 492–493), as had the master (R. 271–274), and they were treated under the latter head in the Government's opening brief, pp. 50–55.

> As a matter of law, therefore, the Indians or the Indian Service representing the Federal Government cannot be compelled to comply with State statutes relative to the acquisition of water rights. As a matter of comity, or courtesy to State officials, however, it has been the practice to at least advise such officials of the rights of the Indians in order that due notice may be had thereof in adjudications by State officers of water rights pertaining to lands in white ownership. The actual filing of an application for permit pursuant to State statutes is not necessary and appears to have been undertaken through a misconception of the situation with reference to matters of this kind. Your action in partly filling out the blank form showing proof of beneficial use, while not absolutely necessary in order to protect the water rights of the Indians, was not at least improper, in that it is not seen how any direct injury will result therefrom. The chief difficulty in matters of this kind is the impression created in the minds of State officials and others that compliance with the State law, or attempt to comply with such law, is an admission that the State and the State officers have jurisdiction over the matters involved therein.

The water permit issued by the State Engineer pursuant to the application of 1910 was endorsed:

> Cancelled June 6, 1921, because of failure of applicant to comply with provisions of permit [R. 824].

The record does not state in what respect the conditions of the permit were not complied with, but it may be presumed, since the cancellation followed soon after the above-quoted letter, that no effort was made to comply because the rights of the Indians and the Government were not dependent on state law. The administrative conduct upon which the appellees rely to show the absence of intent on the part of the Government to reserve water rights was thus not the conduct of the Department of the Interior, but the unauthorized conduct of the local Indian agents on the reservation, which was disapproved by the Office of Indian Affairs.

To prove that water rights were not reserved, the appellees point to the fact that patents were issued to the settlers. In addition to what is said in the Government's opening brief, pages 51–52, it may be noted that in *Winters* v. *United States,* 207 U. S. 564, the decree was entered upon the bill and answer, and the answer alleged that the defendants, before any appropriation, diversion, or use of the waters was made by the United States or the Indians on the Fort Belknap Reservation, and without notice of any claim on the part of the United States or the Indians, and believing that all the waters were open to appropriation, made entry and proof and received patents to their lands in fee simple (207 U. S. 564, 568, 569). Yet the pleading of these facts did not influence the Court's decision. See also *United States* v. *Conrad Investment Co.,* 156 Fed. 123, 131–132 (C. C. D. Mont.,

1907), aff'd 161 Fed. 829, 833–834 (C. C. A. 9, 1908) (Gov't Op. Br. 45).

II

The United States is not barred from the relief it seeks by laches, estoppel, or any other principle of equity

It is believed that the question of laches, estoppel, and equitable principles is adequately discussed in the Government's opening brief (Br. 33–61). The remarks here will be limited to calling the attention of the Court to certain matters in which it is thought the appellees, in their argument, have fallen into error.

The appellees state (Br. 59), citing *United States* v. *Chandler-Dunbar Water Power Co.,* 152 Fed. 25, 41 (C. C. A. 6, 1907), that the United States, in disposing of the upstream lands to the appellees, was acting in a proprietary capacity, and therefore that it should be bound by its conduct in the same manner as an individual. But in *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158, it was pointed out that:

> The United States do not and cannot hold property, as a monarch may, for private or personal uses. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defence and general welfare of the United States." Constitution, art, 1, sect. 8, cl. 1.

To the same effect is *Utah Power & Light Co.* v. *United States,* 230 Fed. 328, 337 (C. C. A. 8, 1915). While a State may act in either a sovereign or a proprietary capacity, see *South Carolina* v. *United States,* 199 U. S. 437, 463; *Los Angeles* v. *Los Angeles Gas Corp.,* 251 U. S. 32, 38–39, the United States can act only under the powers conferred upon it by the Constitution; it cannot act except as a sovereign. This suit, moreover, is brought by the United States in its sovereign capacity and not merely as a nominal party. *United States* v. *Minnesota,* 270 U. S. 181, 194. In *United States* v. *Beebe,* 127 U. S. 338, cited by the appellees (Br. 66) for the proposition that the United States has been held barred on facts analogous to those involved here, the United States was merely a nominal party plaintiff and had no interest in the controversy (127 U. S. 347). In such cases, the immunity from laches does not apply in behalf of the private party who is the true party plaintiff. *United States* v. *New Orleans Pac. Ry. Co.,* 248 U. S. 507, 519.

The appellees (Br. 55) derive from *State* v. *Towessnute,* 89 Wash. 478, 154 Pac. 805 (1916), the equitable principles which, they contend, should prevail in this case. That was a criminal prosecution of an Indian for fishing without a license, and the considerations that affected the court's decision obviously have no application in determining

whether water rights were reserved for the irrigation of arid lands of a reservation.

The appellees state that the United States is seeking to deprive white settlers of water which they have been using for sixty-five years for the benefit of non-existent Indians on uncultivated lands (Br. 68). Here, as in other portions of their brief, the appellees are endeavoring to color the record by exaggerating the loss that will fall to them from the decree sought by the Government, and by minimizing the usefulness and importance to the Indians of the rights asserted for them. The decree sought will merely secure to the Indians the right to so much water as they can beneficially use on the reservation. The area now under cultivation is 2,100 acres (R. 246, 496), and the decree will not immediately deprive the appellees of any water that cannot be used on these 2,100 acres. Finally, if any of the upstream white settlers must relinquish any of the water which they have unlawfully been using, it will not be the pioneers or their descendants; it will be the junior appropriators who have acquired their lands in comparatively recent years, with full knowledge that a large part of the water had already been appropriated, and that the water in which they could acquire rights would only be the water remaining after all other rights were satisfied.

CONCLUSION

For the reasons stated in this brief and in the Government's opening brief it is respectfully sub-

mitted that the decree of the district court should be reversed.

CARL MCFARLAND,
Assistant Attorney General,
ROY W. STODDARD,
C. W. LEAPHART,
Special Assistants to the Attorney General,
THOMAS HARRIS,
ROBERT KOERNER,
Attorneys, Department of Justice,
Washington, D. C.

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No. 8779

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALKER RIVER IRRIGATION DISTRICT
(a corporation), et al.,
Appellees.

Upon Appeal from the District Court of the United States for the District of Nevada.

PETITION OF THE UNITED STATES FOR REHEARING.

NORMAN M. LITTELL,
Assistant Attorney General.

ROY W. STODDARD,
C. W. LEAPHART,
Special Assistants to the Attorney General.

THOMAS HARRIS,
ROBERT KOERNER,
Attorneys, Department of Justice.
Washington, D. C.

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the United States of America, appellant in the above-entitled cause, and petitions this Court for a rehearing for the following reasons:

I.

IN THE IMPLIED RESERVATION OF WATER FOR THE WALKER RIVER RESERVATION THERE WAS RESERVED A FLOW OF WATER SUFFICIENT TO IRRIGATE ALL IRRIGABLE LANDS WITHIN THE RESERVATION.

Under the doctrine of *Winters v. United States,* 207 U. S. 564, affirming 143 Fed. 740, 148 Fed. 684

(C. C. A. 9, 1906), there was an implied reservation of water in a quantity not merely sufficient to supply the present needs of the Walker River Indians, but sufficient to irrigate all irrigable lands of the reservation. Neither in the *Winters* case, nor in the numerous cases in which the doctrine of the *Winters* case has been followed[1] is there any indication that the amount of water reserved was less than sufficient to irrigate the irrigable lands within the reservation. Indeed, the holding in the instant case is contrary to the decision in *Conrad Inv. Co. v. United States,* 161 Fed. 829. There this Court recognized that the implied reservation of water was of a quantity measured not alone by the necessities of present use by the Indians, but as well by their possible future requirements, which, of course, would be limited only by the irrigable acreage of the reservation. Accordingly, this Court allowed the Indians an amount of water sufficient for their present needs but left the decree open for modification upon a showing of increased needs of the Indians.

Furthermore, when regard is had to the decision in *United States v. Powers,* 305 U. S. 527, it is clear that as a practical matter adequate irrigation of any part of the irrigable allotted lands of the reservation will be possible only if there is recognition of the rule that water sufficient for the irrigation of all irrigable acreage is reserved. Congress, by the Act of May 27, 1902,

1. *Conrad Inv. Co. v. United States,* 161 Fed. 829; *United States v. Powers,* 305 U. S. 527, affirming 94 F. (2d) 783; *United States v. McIntire,* 101 F. (2d) 650 (C. C. A. 9, 1939); *United States v. Parkins,* 18 F. (2d) 642 (D. Wyo. 1926); *United States v. Hibner,* 27 F. (2d) 909 (D. Idaho, 1928); *Skeem v. United States,* 273 Fed. 93 (C. C. A. 9, 1921).

32 Stat. 260,[2] as amended by the Joint Resolution of June 19, 1902, 32 Stat. 744,[3] authorized allotment of the Walker River Reservation, in accordance with the provisions of the General Allotment Act of February 8, 1887, sec. 7, 24 Stat. 390. These acts read together clearly evince assumption on the part of Congress that by the reservation of 1859 there had been reserved water sufficient for the irrigation of all irrigable lands on the reservation. They manifestly indicate the view of Congress that at that time the rights of the Indians on the reservation included the right to a flow of water sufficient to supply not only their present needs measured by the existing diversion and use, but as well their future needs determined by diversion and use which might from time

2. This Act provides: "That the Secretary of the Interior be, and he is hereby, directed to allot from the land on the Walker River Reservation in Nevada susceptible of irrigation by the present ditches or extensions thereof twenty acres to each head of a family residing on said reservation, the remainder of such irrigable land to be allotted to such Indians on said reservation as the Secretary of the Interior may designate, not exceeding twenty acres each; and when a majority of the heads of families on said reservation shall have accepted such allotments and consented to the relinquishment of the right of occupancy to land on said reservation which can not be irrigated from existing ditches and extensions thereof and land which is not necessary for dwellings, school buildings or habitations for the members of said tribe, such allottees who are heads of families shall receive the sum of three hundred dollars each to enable them to commence the business of agriculture, to be paid in such manner and at such times as may be agreed upon between said allottees and the Secretary of the Interior. And when such allotments shall have been made, and the consent of the Indians obtained as aforesaid, the President shall, by proclamation, open the land so relinquished to settlement, to be disposed of under existing laws. And the money necessary to pay said Indians is hereby appropriated out of any money in the Treasury not otherwise appropriated."

3. The Joint Resolution of June 19, 1902, 32 Stat. 744, provides: "Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled 'An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto."

to time in the future be made for the irrigation of their lands, including those lying under no existing ditch.

The decision in *United States v. Powers,* 305 U. S. 527, holds that under section 7 of the General Allotment Act of February 8, 1887, recognizing equal rights among resident Indians, allottees, for the cultivation of their allotments, are vested with equal rights in the water reserved for the tribe.

Under this decision each acre of irrigable land allotted under the General Allotment Act, as this was, is entitled to its pro rata share of the available water supply. There are, as this Court found, in the reservation approximately 10,000 acres of irrigable land of which some 9000 have been allotted. But under the decision of this Court the available supply is limited to 26.25 feet of water, adequate for the irrigation of only 2100 acres. As and when the allottees of the remaining land or their purchasers or lessees demand their proportionate shares of water, as is their right under the *Powers* case, the irrigable area of each of the individual allotments on the reservation now being cultivated will suffer a corresponding progressive diminution resulting in an ultimate decrease to an acreage equal to less than one-fourth of the area of the individual allotment.

II.

THE RECORD SHOWS THAT THE AMOUNT OF WATER REASONABLY NECESSARY TO SUPPLY THE NEEDS OF THE INDIANS EXCEEDS 26.25 FEET.

This Court states the applicable rule of law to be that:

> There was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians

and that

> The extent to which the use of the stream might be necessary could only be demonstrated by experience.

1. The needs of the Indians are not properly to be determined by an experience of only seventy years.

This Court holds that the need for only 26.25 feet of water, being the amount necessary for irrigation of the area actually under cultivation by the Indians at the time of trial, has been established as a "fair measure of the needs of the Government as demonstrated by seventy years' experience". The flaw in this reasoning lies in the assumption that determination of the needs of the Indians is properly to be confined to a consideration of the experience in the relatively short period of seventy years. In dealing with the Indians the United States is dealing not merely with the rights of an individual but is seeking to solve the problems of civilizing a people who continue to occupy the status of a dependent race. Plainly, the needs of water of the Government and the Indians in

the cultivation of the lands set aside for support and development of this backward race cannot be determined by reference to the relatively short period of seventy years.

Furthermore, it is to be remembered that the rights of the Indians to use the water of this reservation have only now and for the first time been established by the decision of the Court in the instant case. The record affirmatively shows an abandonment of attempts at agriculture by reason of lack of water caused by upstream diversion. (R. 652-653, 963.) In a suit to establish water rights it is manifestly inequitable to measure those rights by the amount of Indian diversion and use when that diversion and use was obviously reduced in amount by denial by the upstream diverting defendants of the very rights here asserted.

Congress, by the Act of May 27, 1902, 32 Stat. 260, as amended by the Joint Resolution of June 19, 1902, 32 Stat. 744, authorized allotment of the Walker River Reservation in accordance with the provisions of the General Allotment Act of February 8, 1887, sec. 7, 24 Stat. 390. The size of the allotments there directed to be made clearly indicates that the Indian heads of families engaged in agriculture required a minimum of 20 acres, and the allotments to other Indians made by the Secretary, pursuant to the authority delegated to him by Congress, in tracts of 20 acres shows a determination by him that such Indians designated as allottees required as a minimum for practical agri-

culture the maximum fixed by Congress for disposition to them.

Moreover, as Judge Wolverton held in *United States v. Conrad Inv. Co.,* 156 Fed. 123, 129, since the United States holds the reservation lands in trust for the Indians, the United States in its administrative capacity, ought to be the judge of what amount of the waters of the streams of the reservation is essential for the needs of the Indians for use in connection with their lands. Under the *Powers* case, each allottee is entitled to his pro rata share of the water of the reservation, and it follows that Congress in determining that 20 acres of land were needed for each allottee also determined that the amount of water necessary for irrigation of each such tract (90 acre feet) was essential or needed to supply the needs of the individual allottee.

2. The record requires a decree subject to modification upon a showing of an actual existing need by the Indians for more water.

Under the Act of May 27, 1902, c. 888, 32 Stat. 260, *supra,* p. 3, 504 allotments have been made of 20 acres each, totaling 10,080 acres, approximately 9000 of which are irrigable from present constructed ditches and proposed extensions thereof. (R. 614, 641.) About 50% of the allotments are "dead allotments" (R. 614), but this term means not that the allotment is unoccupied, but that the allottee has died and the title passed to his heirs. (R. 642, 656.) There are 943 Indians attached to the reservation

(R. 656), and not every Indian who is entitled to an allotment has an allotment. (R. 657.) In general, both wife and husband have an allotment but many children have none. (R. 665.) Some of the 943 Indians attached to the reservation are not living upon it and the number of those who live on the reservation is about 500. (R. 656-657, 664.) Ninety-six farmers are living on the reservation and farming parts of 140 allotments. (R. 656.) The average farmed by each is slightly under 20 acres. (R. 664.)

The evidence contained in this record, considered in connection with the relevant statutes and regulations, amply shows that the presently foreseeable needs of land and water for the Indians will ultimately equal land in the amount of 10,000 acres and water sufficient to irrigate it.

The testimony of the foreman of irrigation in the Walker River Reservation shows that while all 10,000 acres might ultimately be cultivated by the Indians of the reservation, it is clear that at least 4000 acres may presently be expected to be cultivated by such Indians within a period of 20 years. (R. 657.) The balance, if a water supply is made available, should be leased. Under the Act of March 3, 1921, c. 119, sec. 1, 41 Stat. 1232 (25 U. S. C. sec. 393), the restricted allotments of any Indians may under rules and regulations of the Secretary be leased for farming and grazing purposes by the allottee or his heirs subject only to the officer in charge of the reservation. The pertinent portions of the Regulations of the Indian

Service, Leasing of Indian Allotted and Tribal Lands, May 9, 1929, as amended, provide:

Section 1 authorizes lease of allotted irrigable lands for not more than 10 years.

"4. Any adult allottees deemed by the superintendent to have the requisite knowledge, experience, and business capacity may be permitted to negotiate their own leases and collect the rentals therefor. All such leases, however, must be approved by the superintendent. This privilege should be granted in writing, and with some liberality, and be subject to revocation at any time the allottee proves himself unworthy of it by wasteful expenditure of the money. * * *"

"5. Allotted Indian lands should be leased only to the manifest advantage of the owners, and every able-bodied restricted Indian should be required to withhold from lease a sufficient acreage to serve as a 'homeplace' and farm unless the allottee resides elsewhere and is otherwise gainfully employed."

"22. One of the main objects in making leases should be to provide the land with such permanent improvements as will best fit it for the eventual use and occupancy of the allottee as a home, such, for example, as buildings, fences, wells, fruit trees, alfalfa, proper rotation of crops, conservation of soil fertility, prevention of erosion, etc., unless the land is already provided therewith. Each lease should therefore provide for such of the specific improvements mentioned or others as will accomplish the desired result, for the repair and upkeep thereof at the expense of the tenant, and that the structures, etc., shall remain on the

> land and become the property of the allottee. If the lessee is to erect additional improvements which he wishes to retain, the contract should include a specific provision to this effect, giving the tenant the right to remove them upon expiration of the lease. Leases for allottees who can not personally utilize the land, such as those mentally or physically incapacitated, shall provide for such improvements as will maintain or enhance the rental and market value of the land."

The statute and regulations promulgated thereunder by the Secretary constitute a recognition by the United States that the needs of the Indians may in some cases be best served by the leasing of their allotments. (cf. Act of May 18, 1916, c. 125, sec. 1, 39 Stat. 128.) However, the regulations, particularly section 22 above, clearly show that one of the objects in such leasing, aside from the obtaining of rental income, is the preparation of the land for ultimate Indian use by requiring the tenant to erect on the land certain permanent structures best suited for the utilization of the land for agriculture.

It seems apparent that Congress has adopted a long term policy for adjusting the Indians to farming and a civilized way of life. And it seems equally plain that this program should not be defeated by determining once and for all the needs of the Indians by reference solely to their use of water during the past seventy-five years.

Wherefore, for the foregoing reasons, and because of the importance and far-reaching effects of the de-

cision, the petitioner respectfully requests that rehearing be granted.

Dated, July 5, 1939.

Respectfully submitted,

NORMAN M. LITTELL,
Assistant Attorney General.

ROY W. STODDARD,
C. W. LEAPHART,
Special Assistants to the Attorney General.

THOMAS HARRIS,
ROBERT KOERNER,
Attorneys, Department of Justice,
Washington, D. C.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, July 5, 1939.

Roy W. Stoddard,
Special Assistant to the Attorney General,
Of Counsel for Appellant and Petitioner.

No. 8779

IN THE

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FOR THE 5

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v.

WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, et al., APPELLEES

PETITION FOR REHEARING

WILLIAM M. KEARNEY,
EDWARD F. LUNSFORD,
MYRON R. ADAMS,
GEORGE L. SANFORD,
WILLIAM H. METSON,
ROBERT TAYLOR ADAMS,
Solicitors for Appellees.

Reno Printing Company 129-131 N. Center Street

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WALKER RIVER IRRIGATION DISTRICT, A CORPORATION, et al., APPELLEES

PETITION FOR REHEARING

Come now the appellees in the above-entitled matter and respectfully petition the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, for a rehearing on the following questions:

(a) Whether or not the Walker River Indian Reservation was created earlier than the year 1874, prior to which time there was no executive order creating the same, nor was there any order of the head of a department.

(b) Whether or not there was an implied reservation of water or any reservation of water for the lands embraced within the withdrawal order, irrespective of whether the reservation was legally created in 1859 or by executive order in 1874.

(c) Whether or not the court misapprehended the effect of the Winters decision as applied to the facts in the instant case.

(a) THE HEAD OF THE DEPARTMENT OF THE INTERIOR DID NOT ACT IN NOVEMBER, 1859, SO AS TO CREATE A VALID RESERVATION OF LAND AT THAT DATE.

It is respectfully submitted that the court inadvertently overlooked an important question of fact which was admitted by appellant, from which it follows that the resulting law, as announced, is erroneous.

We quote from page 7 and the top of page 8 of the printed opinion of the court:

> "It is conceded that on the basis of the action taken in November, 1859, the Walker River Indian Reservation was then established. The acts of the heads of departments are the acts of the executive. *Wilcox v. Jackson,* 13 Pet. 498, 513; *Wolsey v. Chapman,* 101 U. S. 755, 769. The subsequent proclamation of the President merely gave formal sanction to an accomplished fact. *No. Pac. Ry. Co. v. Wismer,* 246 U. S. 283; *Minnesota v. Hitchcock,* 185 U. S. 373, 389-390."

It is respectfully submitted:

1. That the court inadvertently erred in the statement that the appellees "concede that the Walker River Indian Reservation was established in 1859." The record throughout as well as the opinion and decision of the District Court clearly show that appellees always contend that the lands in the reservation were not

withdrawn from the public domain until the entry of the executive order of President Grant on March 23, 1874. The claim of appellees that the lands were not set apart from the public domain as a reservation finds support not only in the act of Congress of February 8, 1887 (24 Stats., 388-1 Kappler 33), but also by the Supreme Court of the United States in *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States,* 299 U. S. 476-498; 81 L. Ed. 360. Only three methods are recognized by which an Indian Reservation can be created, namely:

1. By treaty.
2. By Act of Congress.
3. By executive order.

It can hardly be claimed that the letter of November 29, 1859, from the Commissioner of Indian Affairs to the Commissioner of the General Land Office legally set apart public lands for the Indians. No authority exists for the Commissioner of Indian Affairs or the Commissioner of the Land Office to set apart public lands for Indians or for any other reservations.

In *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States,* 299 U. S. 476, 81 L. Ed. 360, decided by the Supreme Court on January 3, 1937, the Supreme Court overruled the decision of the court of claims holding that a letter written by the Commissioner of Indian Affairs in 1891 had the effect of taking from the Shoshone Indians a one-half interest in their reservation for the benefit of the Arapahoes.

The court must have inadvertently overlooked the admission of counsel for the appellant made during the oral argument before the Circuit Court of Appeals, when it was stated that the proof was lacking to show action by the Secretary of the Interior, who was the head of the department.

In the argument in support of the claim advanced by the United States that the Walker River Indian Reservation was created on November 29, 1859, counsel for the government was frank enough to admit that there was a hiatus in its proof in that the government (appellant) could not support its theory by any order, direction or act of the department head prior to the withdrawal or the creation of the reservation by Presidential order on March 19, 1874, but only through the letter of the Indian Commissioner. This failure of proof, we respectfully contend, is fatal to the appellant's theory that the lands involved (aside from its claim of implied reservation of water) were withdrawn in 1859. It will be noted that in the case of *Wilcox v. Jackson,* 13 Peters 498, 513, the Secretary of War acted in creating the reservation involved and not a subordinate officer. This case seems to be the leading case upon which the subsequent cases are predicated so that the language of the court should be noted as follows:

> "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation, the act of the President; and,

> consequently, that the reservation thus made was in legal effect, a reservation made by order of the President, within the terms of the act of Congress."

Therefore, it is respectfully submitted that cases which follow and are predicated upon such language must refer to the head of the department, that is to say, the head of the War Department, the head of the Department of the Interior, etc.

In *Wolsey v. Chapman,* 101 U. S. 755, 769, referred to in this court's opinion, it will be noted that the Secretary of the Interior acted in the premises and approved the action taken with reference to the lands involved.

In each instance that was covered by the proof in the instant case, only subordinate officers of the Department of Interior acted, making the suggestions contained in the letters relied upon as the basis of the withdrawal. We doubt if anyone would contend that the Indian Agent, Dodge, or the Surveyor General for the Territory of Utah had the power to control the future policy of the government by making withdrawals, for it has been held that the Commissioner of Indian Affairs has no power to control the future policy of the government.

As was said in *Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. the United States,* 299 U. S. 476-498, 81 Law Ed. 360:

> "But the Commissioner of Indian Affairs was not empowered to fix the future policy of the Government, still less to exercise in its behalf the power of eminent domain."

The Commissioner of the General Land Office could exercise no greater power than could the Commissioner of Indian Affairs with respect to the creation of an Indian Reservation out of lands held in trust for all the people of the United States.

It will be noted that the case of *Wilcox v. Jackson,* supra, referred to by this Honorable Court on page 7 of the printed opinion, does not involve the act of a subordinate officer such as the Commissioner of Indian Affairs or the Commissioner of the General Land Office. It involves the act of the Secretary of War, which is one of the heads of the several departments of the government. We quote from the opinion:

> "At the request of the Secretary of War, the Commissioner of the General Land Office, in 1824, colored and marked upon the map this very section, as reserved for military purposes, and directed it to be reserved from sale for those purposes. We consider this as having been done by authority of law; for amongst other provisions in the act of 1830, all lands are exempted from preemption which are reserved from sale by order of the President. Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President."

Under the Act of July 9, 1832, Chapter 174, 4 Stat. 564, the Commissioner of Indian Affairs was acting under the direction of the Secretary of War. The jurisdiction over the Bureau of Indian Affairs was transferred to the Department of the Interior in the year 1849 (9 Stat. 395).

Even in the case of *Northern Pacific Railway Company v. Wismer,* 246 U. S. 283, it is clear that the agreement made by the Indian Department with the Indians in the State of Washington whereby a reservation was created was made with the full understanding of the Secretary of the Interior and acquiesced in by the head of the department by actually dealing with the Indians pursuant to such agreement and as the court said, "with full understanding of the situation." The court there held that even though there was no formal approval by the Secretary of the Interior, his conduct indicated such approval and knowledge.

> "* * * the Secretary of the Interior and the Commissioner of Indian Affairs approved the action of Colonel Watkins not later, certainly, than the sending of his report to the Senate on January 23, 1878, which was almost three years prior to the filing of the railroad company's plat,"

It will be particularly noted that an agreement existed with the Indians in the last mentioned case which is not present in the instant case. Here, the land was a part of the public domain without any right or claim to its occupancy by the Indians, as was the situation in all of the other cases cited in the court's decision; and it follows, therefore, that the same rules cannot be applied here as were applied in those cases.

(b) (c) THERE WAS NO IMPLIED RESERVATION OF WATER EITHER IN 1859 OR IN 1874 BASED UPON THE DECISION IN THE CASE OF WINTERS V. UNITED STATES, 207 U. S. 564, WHEN APPLIED TO THE CONTROVERTED FACTS IN THE INSTANT CASE.

From the opinion entered in this case it seems apparent that certain contentions made by Appellees have not been fully considered, or have been misapprehended. If those contentions are duly considered it would seem that this court's decision and order should be rendered in favor of Appellees and that the Appellant should be denied an 1859 priority, but should be allotted the priorities established by the lower court based on appropriation and application to beneficial use.

This court predicates its opinion upon the case of *Winters v. United States,* 207 U. S. 564, and other authorities following the Winters case involving the same factual situation as existed in that case.

It is earnestly contended by the Appellees that the Winters case, while correctly stating the law applicable to the peculiar facts of that case, has no application to the facts as presented by this appeal. Also, that several cases decided by this court and federal and state cases of this circuit have correctly established the law applicable to this case.

The Winters case, along with later cases involving like factual situations, is to be distinguished from the facts before this court for the following reasons:

1. The Indians had fundamental rights of occupation recognized in effect as property rights by the United States prior to the agreement between the United States and the Indians which resulted in the cession of certain of said land to the United States and a withdrawal and retention by the Indians of a smaller area for them-

selves. By the agreement or treaty with the Indians, the lands relinquished by the Indians became for the first time public lands freed from the restrictions of the reservation and subject to entry.

In every case cited by the court and by counsel for the Appellant, involving implied reservation of waters for use on Indian reservations, it is emphasized and re-emphasized that the reservation of waters was to the Indians arising out of the grant by the Indians to the United States of their lands. For example this court so stated in the case of *Skeem v. United States,* 273 Fed. 93 (C. C. A. 9, 1921).

We ask the privilege of re-emphasizing our reference to the Skeem case as the same appears at page 49 of our brief, and in order to demonstrate the point we are making we again quote from that case the following language:

> "First. The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted *were reserved to the Indians.* * * *." (Italics ours.)

See also *United States v. McIntire,* 101 Fed. (2d) 650, C. C. A. 9, 1939.

In this very same connection we feel that this court has confused the difference between a grant by the Indians, as in the Winters case, and a gratuitous voluntary grant by the Government to the Indians, such as in the instant case. We make this statement on account

of the fact that in discussing the Winters case this court, in paragraph (d), at the bottom of page 5 of the printed opinion, states as follows:

> "Treaties with the Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards. * * *" Citing cases.

We respectfully submit that in the instant case there was neither a treaty nor a statute of Congress disposing of this property to the Indians.

So, the question of intent was to be determined from the terms of binding treaties by which the ignorant savages released all claims to large areas of lands in return for smaller areas on which they agreed to live. The implied reservation of water by necessary implication from these factual circumstances can have no application to the situation presented by the facts of this case.

The record before this court shows that in 1859, certain letters passed between certain subordinate officers of the Department of the Interior. The court has found from these letters and acts that there was no express reservation of the waters of the Walker River for the use of any Indians who might make their homes on the lands so set aside. There was, then, no ceding of lands by the Pahute Indians to the Appellant, by treaty, for the circumscribed area of the reservation set aside for their use. There was no grant by the Indians under such circumstances that a reservation of that which was not granted was, under ordinary prin-

ciples of law, reserved. If the Pahutes are now given an 1859 water right, it is by way of a grant to them and not by the theory of implied reservation as set out in the Winters and like cases. To imply a grant of these waters to the Indians in 1859 is to detract from the expressed dedication of Congress to the western pioneers in the acts of 1866 and 1877 of these same waters. To hold that these waters were granted to the Indians by the Appellant because of these acts of the officers of the Interior Department this court must not only infer that the public for which the United States held this land in trust was to be deprived of the use of this water, but also that it was intended to create an exception to the application of local laws to the obtaining of water rights based on local conditions and economic necessity.

(See *Taylor v. United States,* 44 Fed. (2d) 531; C. C. A.9.

In every case where the before-mentioned peculiar facts of the Winters and like cases were not involved the western Federal and State courts, including this Circuit Court, have held that merely by setting land aside for a particular purpose the United States did not grant or reserve water rights.

Krall v. United States, 79 Fed. 241 (C. C. A. 9, 1897).

United States v. Wightman, 230 Fed. 277, 284 (Ariz. 1916).

Larson v. Johnson, 23 Ariz. 360, 203 Pac. 874.

Kansas v. Colorado, 206 U. S. 46.

Byers v. "Wa Wa Ne," 86 Ore. 617, 169 Pac. 121.

Taylor, et al, v. United States, 44 Fed. (2d) 531 (C. C. A. 9, 1930), (Certiorari denied United States v. Taylor, 283 U. S. 820).

2. The lands involved in the Winters case were never affected by the acts of 1866 and 1877 because they were never a part of the public domain until the Ratifying Act of Congress of 1888; whereas, in the instant case, the upstream lands were always public domain and the white settlers' rights to the waters of Walker River were specifically recognized by the Acts of 1866 and 1877.

3. Indians have no right against the government.

In 1859 there was no deed, grant, law, treaty or prescriptive right or plain language evincing any color of title in the Pahute Indians to the waters of the Walker River. True, certain letters dealing with a proposed reservation for these Indians had passed between subordinate officers of the Department of the Interior, but these letters did not give the Indians any rights against the government that may now be enforced in their behalf.

United States v. Ashton, 170 Fed. 509 (Appeal dismissed, 220 U. S. 604).

The executive order of 1874 setting apart the land near Walker Lake as an Indian Reservation was effective only by reason of Congress having acquiesced by silence. Therefore, water should not be taken away

from one part of the public domain and given to another by mere implication.

Shoshone Tribe of Indians v. United States, supra.

United States v. Midwest Oil Co., 236 U. S. 459.

The express intent of Congress to hold the public lands as trustee for the white pioneers and to provide water for the settlers taking up those lands as is demonstrated by the Acts of 1866 and 1877, would seem to offset any implied intention to reserve those waters to Indians, except as and when they might appropriate and use the same.

Even assuming the reservation of land alone was effective in 1859, which we do not concede, in applying the test announced in the decision in the case of *Alaska Pacific Fisheries v. United States,* 248 U. S. 78, referred to in the court's opinion, page 3, we must find the following differentiations:

a. Circumstances in which Walker Lake Indian Reservation was created.

1. Indians were at war with whites. (br. 36).
2. Walker Lake and surrounding area was the source of Indian food (br. 36).
3. The purpose was to give emigrants protection and to preserve peace.
4. No lands had ever been cultivated by the Pahute Indians; they were a war-like nomadic tribe, and the idea of having them cultivate lands was an after-thought.

5. If the government had contemplated in 1859 that the Indians would support themselves by agricultural pursuits, they would have chosen a site for the reservation in one of the fertile upstream valleys. (Br. 36-37.)

b. Power of Congress.

Admitting, for the purposes of this argument, the power of Congress, it is to be considered that Congress did not act with regard to this reservation in 1874. As pointed out, the most that can be found is a silent acquiescence of Congress to the executive order. To find that from this silent acquiescence of Congress to the withdrawal of public lands from sale, there was a withdrawal of the water by implication is to disregard the fact that Congress was holding these same lands and waters as trustee for the public, and by inconsistent legislation not mentioning Indian reservations, had provided the sole means of acquiring vested interests in the waters of the western streams.

c. Location and character of lands.

As pointed out, these lands were not chosen for cultivation, otherwise other lands upstream, rather than at very end of a desert stream would have been selected.

d. Situation and needs of Indians and objects to be attained.

The object sought by the subordinate officers of the Department of Interior in setting this area aside, because of the then situation and needs of the Pahute Indians in Nevada was to preserve to the Indians the source of their natural food, a lake and 86,000 acres of hunting and fishing grounds, to keep out white trespassers and to preserve peace by offering the Indians an asylum of refuge. The purpose of putting the lands into cultivation came as an after-thought.

Even if it could be assumed that one of the objects in establishing the reservation was that the Indians were to make it productive with the aid of the government, it is not too unjust to the Indians to require them to exercise the same diligence in placing these lands under cultivation as was exercised by the pioneer whites. Especially when the government rendered them assistance and aid that was not rendered to the upstream whites. Thus, these Indians were not at a disadvantage when compared to the whites in bringing their lands under cultivation.

In the Winters case there was undoubtedly a great influx of people after the land was restored to the public domain who began to appropriate the waters of the several streams. Whereas, in the instant case, this was not Indian country, and the Indians had no recognized rights of occupancy in the territory, and the Indians had no rights other or different than any other settler upon the public domain, and the appropriation of the waters from the Walker River over a period of seventy-five years has been gradual, and the government during all of these years has had notice of the whites coming in from year to year and settling upon the lands and appropriating the water. During this period of time the government has actively aided the Indians in bringing their lands under cultivation, with the result that the Indians should be required to take their rights in the order of their priorities, as and when, from year to year, they have appropriated the waters.

The record is silent as to any requirement that any Indian was ever required to live on the reservation or make the reservation his home, as in the cases where treaties existed.

The upstream whites could not divert the waters without limit, but were bound to recognize any valid and bona fide appropriation made by the Indians with the invaluable assistance of the government.

That the government did not intend to reserve the waters in 1859 or in 1874 and that the acts of the subordinate officials of the Department of the Interior were not given that effect until very recently, affirmatively appears from the acts of the officers of this same Department of the Interior.

To shorten this petition for rehearing as much as possible, we respectfully refer ths court to the following pages of our brief, where this matter is discussed: pp. 51, 52, 53, 54, 61 and 67; and also to the very pertinent opinion of Judge Sawtelle in *United States v. Wightman*, 230 Fed. 277, 284, wherein it is stated:

> "The same officers of the government charged with the protection of the Indians also execute its land laws, for both are under the charge of the Secretary of the Interior, and his action in approving the sale of the land with water rights is of equal dignity and binding force on the government as the demand now made by his subordinate with his approval for the use of the waters by Indians * * *."

It is respectfully submitted that no implied reservation of water should attach as of the year 1859 or at

all by virtue of the letter of the Commissioner of Indian Affairs and that the rights of the Indians should be placed on a basis of appropriation the same as the white settlers. Neither party will suffer injuries under such a rule as conditions exist at this time.

Dated: July 1, 1939.

William M. Kearney,
Edward F. Lunsford,
Myron R. Adams,
George L. Sanford,
William H. Metson,
Robert Taylor Adams,
Solicitors for Appellees.

The undersigned counsel for appellee hereby certify that the foregoing petition is presented in good faith and not for delay.

WILLIAM M. KEARNEY,

EDWARD F. LUNSFORD,

MYRON R. ADAMS,

GEORGE L. SANFORD,

WILLIAM H. METSON,

ROBERT TAYLOR ADAMS,

Solicitors for Appellees.

No. 8797

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States for the District of Montana.

Parker Printing Company, 545 Sansome Street, San Francisco 60-4-19-38

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. ELMER E. HERSHEY
of Missoula, Montana,
Attorney for Plaintiff and Appellee.

Mr. JOHN P. SWEE
of Ronan, Montana,
Attorney for Defendants Alex Pablo and A. M. Sterling, Defendants and Appellees.

Mr. JOHN B. TANSIL,
United States District Attorney,
Billings, Montana, and

Mr. KENNETH R. L. SIMMONS,
District Counsel,
United States Indian Irrigation Service,
Billings, Montana,
Attorneys for United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Manager of Flathead Reclamation Project, and Nineteen members of the Flathead Tribe of Indians, Defendants and Appellants.

Messrs. POPE & SMITH,
of Missoula, Montana,
Attorneys for Defendant Flathead Irrigation District, Defendant and Appellant.

[1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States
in and for the District of Montana

No. 1496

AGNES McINTIRE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

Be it remembered, that on February 13, 1934, a Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [2]

COMPLAINT

Now comes the above named plaintiff and files this her Complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands. [3]

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Agatha Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and on October

8, 1908 trusts patents were issued to both of the Indian allottees for their respective lands.

III.

That on or about the 15th day of April, 1900 said Indian allottees dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irrigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned.

[4]

IV.

That on January 25, 1918 a fee patent was issued to said Indian allottee, Michel Pablo, for the lands allotted to him, and on October 5, 1916 a fee patent was issued to Agatha Pablo, allottee, for said lands allotted to her, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now

the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L p 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit of said Act of Congress

in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims [5] an interest in the waters flowing in said Mud Creek and has *damed* up said Creek and carries part of the waters away from plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L p 416, for the purpose of completely adjudi-

cating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined.

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independ- [6] ent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's head gate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interferring with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem [7] meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY,
Attorney for Plaintiff.

State of Montana
County of Lake—ss.

Agnes McIntire, being first duly sworn according to law, deposes and says:

That she is the plaintiff in the foregoing action; that she has heard read the foregoing complaint and that the matters and things therein stated are true of her own knowledge, except as to matters stated upon information and belief, and as to such matters she believes them to be true.

MRS. AGNES McINTIRE.

Subscribed and sworn to before me this 10th day of February, 1934.

[Seal] LLOYD I. WALLACE,
Notary Public for the State of Montana. Residing at Polson, Montana.

My Commission expires August 1, 1934.

[Endorsed]: Filed Feb. 13, 1934. [8]

Thereafter, on March 21, 1934, a Return of Service of the Bill of Complaint was duly filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

AFFIDAVIT.

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being first duly sworn according to law, deposes and says:

That he caused a copy of the Bill of Complaint, filed in the above case, to be served upon the United

States District Attorney for the District of Montana, on the 13th day of February, 1934, by depositing in the United States postoffice at Missoula, Montana, a full, true and correct copy of said Bill of Complaint securely sealed, postage prepaid and registered, and addressed to said United States Attorney at Helena, Montana, and the same was received by him on February 14, 1934, as evidenced by his return receipt showing such service, attached hereto and made a part of this affidavit.

That on February 13, 1934, he mailed a copy of said Bill of Complaint by registered letter to the Attorney General of the United States at Washington, D. C., and the same was received by him on February 16, 1934, as evidenced by the return receipt, which is attached hereto and made a part of this affidavit. [9]

That on February 13, 1934, he addressed a letter to the Secretary of the Interior inclosing a copy of said Bill of Complaint by registered mail, a copy of which letter is attached hereto and made a part hereof. That the same was received by the Secretary of the Interior on February 17, 1934, as is evidenced by his return receipt which is attached hereto and made a part hereof.

ELMER E. HERSHEY.

Subscribed and sworn to before me this 20th day of March, 1934.

[Seal] RALPH L. ARNOLD,
Notary Public for the State of Montana. Residing at Missoula, Montana.

My commission expires December 18, 1934.

Tuesday,
February thirteenth,
Nineteen Thirty-four.

Mr. Harold L. Ickes,
Secretary of the Interior,
Washington, D. C.

Dear Sir:

I inclose, herewith, copy of Complaint in the case of Agnes McIntire vs. The United States of America, et al., this day filed in the U. S. District Court at Helena, Montana.

Will you voluntarily appear thereto, or shall I proceed and obtain an Order under the provisions of Sec. 57 of the Judicial Code of the United States, (36 Stat. L., 1102).

Very respectfully,
ELMER E. HERSHEY.

Post Office Department
Official Business
Registered Article
No. 4272
Insured Parcel.

Penalty for private use to avoid payment of postage, $300.

Post mark of delivering office.

(Helena, Mont. Feb. 14, 1934. Registered)

Return to Elmer E. Hershey,
(name of sender)
Box 666,
(Street and number or Post Office Box)
Post Office at Missoula, State of Montana.

Return Receipt

Received from the Postmaster the Registered or Insured article, the original number of which appears on the face of this card.

JAMES H. BALDWIN,
U. S. Atty. for District of Montana.
(signature or name of addressee)

Date of delivery 2/14/1934.

J. C. KEENAN,
Agent. [10]

Post Office Department
Official Business
Registered Article
No. 4274.
Insured Parcel.

Penalty for private use to avoid
payment of postage, $300.
Post mark of delivering office.
(Washington, D. C. 9, Feb. 17, 10AM., 1934)

Return to Elmer E. Hershey,
(name of sender)
Box 666,
(Street and number or Post Office Box)
Post Office at Missoula, State of Montana.

Return Receipt

Received from the Postmaster the Registered or Insured article, the original number of which appears on the face of this card.

Department of Justice
(Signature or name of addressee)
W. E. FEENEY
(Signature of addressee's agent)
Date of delivery Feb. 16, 1934.

Post Office Department
Official Business
Registered Article
No. 4273.
Insured Parcel.

Penalty for private use to avoid
payment of postage, $300.
Post mark of delivering office.
(Washington, D. C. 3, Feb. 17, 10PM., 1934)
Return to Elmer E. Hershey,
(name of sender)
Box 666,
(Street and number or Post Office Box)
Post Office at Missoula, State of Montana.

Return Receipt

Received from the Postmaster the Registered or Insured article, the original number of which appears on the face of this card.

Interior Department
Secretary's Office
(Signature or name of addressee)
per IRVING JOHNSON, Authorized Agent.
(Signature of addressee's agent)

Date of delivery Feb. 17, 1934.

[Endorsed]: Filed March 21, 1934. [11]

Thereafter, on March 23, 1934, a Motion for an Order directing defendant Harold L. Ickes, Secretary of the Interior to appear, etc., herein, was duly filed herein, being in the words and figures following, to-wit: [12]

[Title of District Court and Cause.]

MOTION

Now comes the above named plaintiff and moves the Court that an order be made directing defendant, Harold L. Ickes, Secretary of the Interior, to appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Section 57 of the Judicial Code of the United States (36 Stat. L. 1102), (Title 28, U. S. C. A. Sec. 118), and that a copy of the complaint filed herein together with a copy of said order be forthwith served upon said defendant.

Said defendant Harold L. Ickes, Secretary of the Interior, is not an inhabitant of the District of Montana, and has failed to voluntarily appear in said action, although requested to do so in a letter addressed to said defendant on February 13, 1934, inclosing a copy of said complaint, which letter was registered and the return card shows that the same was received on February 17, 1934.

Dated March 22, 1934.

(Signed) ELMER E. HERSHEY
Attorney for Plaintiff

[Endorsed]: Filed Mar. 23, 1934. [13]

Thereafter, on March 23, 1934, an Order directing Harold L. Ickes, Secretary of the Interior, to appear, etc., was duly filed and entered herein, being in the words and figures following, to-wit: [14]

[Title of District Court and Cause.]

ORDER

Upon application of Elmer E. Hershey, Attorney for plaintiff, and upon the records and files in said case,

It is ordered that said Harold L. Ickes, Secretary of the Interior, defendant herein, appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Sec. 57 of the Judicial Code of the United States (36 Stat. L., 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of this order, together with a copy of the complaint, be served upon said defendant forthwith.

Dated this 23 day of March, 1934.

BOURQUIN

Judge

[Endorsed]: Filed and entered March 23, 1934. [15]

Thereafter, on March 29, 1934, a Subpoena in Equity was duly filed herein, being in the words and figures following, to-wit: [16]

[Title of District Court.]

SUBPOENA IN EQUITY

The President of the United States of America
To The United States of America, Harold L. Ickes, Secretary of Interior and Henry Gerharz, Project Manager of Flathead Reclamation Project, Greeting:

You are hereby commanded that all excuses and delays set aside you within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Montana, at Helena, Montana, answer or otherwise plead unto the bill of complaint of Agnes McIntire, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Geo. M. Bourquin, United States District Judge at Helena, Montana, this 13th day of February, A. D. 1934.

[Seal] C. R. GARLOW
Clerk
By H. H. WALKER
Deputy Clerk

MEMORANDUM

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

ELMER E. HERSHEY
Missoula, Montana,
Attorney for Plaintiff [17]

RETURN ON SERVICE OF WRIT

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Subpoena in Equity on the therein-named Henry Gerharz, Project Manager, Flathead Reclamation Project by handing to and leaving a true and correct copy thereof with him personally at St. Ignatius Mission in said District on the 21st day of March, A. D. 1934.

ROLLA DUNCAN
U. S. Marshal
By NED S. GOZA
Deputy

Marshal's	Fee	$2.00
"	Expense	2.48
	Total	$4.48

[Indorsed on back]: Original. No. 1496. United States District Court, District of Montana. Agnes McIntire vs. The United States of America, et al. Subpoena in Equity. Filed on the 29th day of Mar. 1934. C. R. Garlow, Clerk. By G. Dean Kranich, Deputy. [18]

Thereafter, on April 9, 1934, Special Appearance and Objection to Jurisdiction by the United States, was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant the United States of America, appearing specially and not voluntarily herein and for the sole purpose only of objecting to the jurisdiction of the above entitled court in the above entitled suit over it and says:

That this Court does not have any jurisdiction over the United States of America as a party defendant in this action for the reason that the United States of America, without its consent, cannot be sued, and in this action has not consented to be sued.

Wherefore, the United States of America prays that the complaint in this action be dismissed and held for naught as against it.

JAMES H. BALDWIN
United States Attorney for
the District of Montana.
ROY F. ALLAN
Assistant U. S. Attorney.
DONALD J. STOCKING
Assistant U. S. Attorney.

[Endorsed]: Filed April 9, 1934. [19]

Thereafter, on April 9, 1934, Special Appearance and Objection to Jurisdiction by Deft. Harold L. Ickes, Secretary of the Interior, was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now Harold L. Ickes, Secretary of the Interior, appearing specially and not voluntarily herein, and for the sole purpose only of objecting to the jurisdiction of the above-entitled court in the above-entitled suit over him says:

1. That said Court does not have any jurisdiction over him as a party defendant in said suit for the reason that the same is brought against him in

a district court other than that of the district whereof he is an inhabitant.

2. That this suit is essentially and substantially, despite the alleged joinder of the Secretary of the Interior, a suit against the United States of America and is therefore beyond the jurisdiction of this Court, for the reason that the United States without its consent cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged Complaint in this suit be dismissed and held for naught as against him.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

[Endorsed]: Filed April 9, 1934. [20]

Thereafter, on April 9, 1934, Special Appearance and Objection to Jurisdiction by Deft. Henry Gerharz, was duly filed herein, being in the words and figures following, to-wit:

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant Henry Gerharz, as denominated in the Bill of Complaint, Project Man-

ager of the Flathead Reclamation Project, and appearing specially and not voluntarily herein and for the purpose of objecting to the jurisdiction of the above entitled court in the above entitled suit over him, says:

1. That the Bill of Complaint in said action fails to state facts sufficient to constitute a cause of action in equity or otherwise against Henry Gerharz in his denominated capacity in said Bill of Complaint as Project Manager of Flathead Irrigation Project or otherwise, and does not state facts sufficient to entitle the plaintiff to any relief as against Henry Gerharz as Project Manager or otherwise.

2. That this suit is essentially and substantially, despite the alleged joinder of Henry Gerharz in his denominated capacity in the said Bill of Complaint, as Project Manager of Flathead Irrigation Project, a suit against the United States of America and is therefore beyond the jurisdiction of this court for the reason that the United States, without its consent, cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged complaint in this suit be dismissed and held for naught as against him.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

[Endorsed]: Filed April 9, 1934. [21]

Thereafter, on April 16, 1934, Motions to Dismiss were denied, the minute entry thereof being in the words and figures following, to-wit:

[Title of District Court and Cause.]

Counsel for respective parties present in court, Mr. E. E. Hershey appearing for plaintiff and Mr. James H. Baldwin, U. S. Attorney, appearing for defendants. Thereupon the defendants' motions to dismiss the bill of complaint herein were submitted to the court without argument, whereupon court ordered that said motions be and are denied.

Entered in open court April 16, 1934.

C. R. GARLOW,
Clerk. [22]

Thereafter, on April 25, 1934, Answer of the United States was duly filed herein, being in the words and figures following, to-wit: [23]

[Title of District Court and Cause.]

ANSWER

Comes now the United States of America, one of the defendants in the above entitled action, and for its answer to the complaint in equity on file herein, alleges:

I.

For a first affirmative defense that this action is not one in which the United States of America has consented to be sued.

II.

For a second affirmative defense, that the action was not one brought for the partition of lands.

III.

For a third affirmative defense, that this action is in fact and legal effect one brought to settle the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek on the Flathead Indian Reservation in the State and District of Montana.

IV.

For a fourth affirmative defense, that the facts stated therein are insufficient to constitute a valid cause of action in equity against this answering defendant.

Wherefore, having fully answered, the United States of America prays:

1. That plaintiff take nothing by her action;

2. That the United States of America have judgment against plaintiff for its costs and disbursements herein necessarily expended.

3. For such other and further relief as may be fit and proper in the premises.

JAMES H. BALDWIN
United States Attorney for the
District of Montana. [24]

United States of America,
District of Montana,
County of Silver Bow—ss.

James H. Baldwin, being duly sworn on oath, deposes and says:

That he is the United States Attorney for the District of Montana, and as such makes this verification to the foregoing answer:

That he has read the same and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

JAMES H. BALDWIN

Subscribed and sworn to before me this 25th day of April, 1934.

[Seal] HAROLD L. ALLEN
Deputy Clerk U. S. District Court
District of Montana.

[Endorsed]: Filed April 25, 1934. [25]

Thereafter, on April 25, 1934, Answer of Deft. Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [26]

[Title of District Court and Cause.]

ANSWER

Comes now Henry Gerharz, Project Engineer of Flathead Irrigation Project, incorrectly designated in the title of the bill of complaint as Project Man-

ager of Flathead Reclamation Project and for answer to the complaint in equity herein alleges:

I.

Defendant admits the allegations contained in Paragraph I of plaintiff's complaint save and except the allegation that "one inch of water per acre is necessary for the proper irrigation of said lands". As to this allegation, defendant states that he is without knowledge.

Defendant alleges that the said Flathead Irrigation Project is incorrectly designated in the title of this action and in certain paragraphs of the complaint herein as Flathead Reclamation Project, and alleges that the said Project is subject, not to the Reclamation Laws, but to the Indian Irrigation Project Laws of the United States.

Defendant alleges by the establishment of the Flathead Reservation referred to in Paragraph I of plaintiff's complaint, the United States, defendant herein, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial purposes upon the lands of said reservation and exempted from appropriation under territorial or state laws or otherwise, all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation. [27]

II.

Defendant admits that Michel Pablo and Agatha Pablo are Flathead Indians of the Flathead tribe

or nation of Indians and states that except as hereinbefore expressly admitted he is without knowledge as to any allegation contained in Paragraph II thereof and in this connection alleges that the lands described in said complaint in equity are situated within the Flathead Indian Reservation in Lake County, Montana.

III.

States that he is without knowledge as to any allegation contained in Paragraph III thereof.

IV.

States that he is without knowledge as to any allegation contained in Paragraph IV thereof.

V.

Admits the enactment into the laws of the United States the provision of Section 19 of the Act of Congress of June 21, 1906 (34 Stat. L 355) and except as hereinbefore specifically admitted, states that he is without knowledge as to any allegation contained in Paragraph V thereof.

VI.

Admits that the United States of America claims an interest in the waters flowing in said Mud Creek and has dammed up said creek, and except as hereinbefore specifically admitted, states that he is without knowledge as to any allegation contained in Paragraph VI thereof.

VII.

Denies that there are no other parties using the waters of Mud Creek except plaintiff and the United States of America, and in this connection alleges that there are numerous users of the waters of Mud Creek whose lands are situated both above, below and adjacent to the lands described in the complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause, and except as hereinbefore specifically denied or qualified states that he is without knowledge as to any allegation contained in Paragraph VII thereof. [28]

VIII.

Alleges that all acts done by this answering defendant in regard to lands and waters mentioned in said complaint in equity were and are and will continue to be proper and lawful acts done in pursuance of the orders, rules and regulations of the Secretary of the Interior of the United States of America, made and promulgated by said Secretary under and by virtue of the authority vested in him by the laws and statutes of the United States of America to carry the same into effect.

IX.

Denies that he has ever wrongfully or without right claimed that plaintiff has no water right on

Mud Creek independent of the Flathead Irrigation Project and denies that he has unlawfully claimed the right to shut out plaintiff's headgate or to prevent waters from flowing into plaintiff's ditch or to deprive plaintiff of the use of said waters upon said lands, except by paying to said Flathead Irrigation Project fees and charges.

Defendant, however, admits and avers that in the course of his employment as Project Engineer of the Flathead Irrigation Project, acting under the direction and authority of the Secretary of the Interior, pursuant to laws and statutes of the United States, he assessed against a portion of said lands claimed by plaintiff, certain charges for construction, operation and maintenance of the Flathead Irrigation system and further alleges that said charges and each thereof were and are lawful and proper;

Defendant further alleges that on August 26, 1926, an order was duly given, made and entered of record in the District Court of the Fourth Judicial District of the State of Montana in and for the counties of Lake and Sanders in a proceeding entitled "In the Matter of the Formation of the Flathead Irrigation District" including the following described portion of the lands claimed by plaintiff herein in the Flathead Irrigation District, to-wit:

> West half (W½) of Northeast quarter (NE¼) of Section 14, in Township 21 North of Range 20 West, of the Montana Principal Meridian, in Lake County, Montana.

That subsequently said Flathead Irrigation District entered into a repayment contract with the United States of America and the above described lands became and are now subject to the terms and conditions of such repayment contract. [29]

X.

States that he is without knowledge of the value of the water mentioned in the complaint in equity herein.

XI.

Denies that this action is necessary to prevent a multiplicity of *of* suits.

XII.

Denies that plaintiff has no plain, speedy or adequate remedy at law.

XIII.

Denies each and every allegation contained therein which is not hereinbefore specifically admitted, qualified or denied.

1. First affirmative defense.

For a further answer and by way of a first affirmative defense this answering defendant says:

That this action is not one for the partition of lands, but is in truth and in fact and in law an action to quiet title to the use of water.

2. Second affirmative defense.

For a further and second affirmative defense, defendant says:

That the facts stated in the complaint in equity herein are insufficient to constitute a valid cause

of action in equity as against this answering defendant.

3. Third affirmative defense.

For a further and third affirmative defense, defendant says:

That the above entitled court is without jurisdiction or authority to proceed further in this action for want of necessary parties, for this, that there are numerous users of the waters of Mud Creek whose lands are situate thereon and adjacent thereto and both above and below the lands described in the complaint in equity herein, whose rights to the use of the waters of said creek may be injuriously affected by any decree that the above entitled court may render or enter in the above entitled cause and whose presence either as parties plaintiff or defendant in this action is necessary and proper to a complete determination of this cause and of the issues of the right to and the amount or duty of water involved in this cause. [30]

4. Fourth affirmative defense.

For a further and fourth affirmative defense, defendant says:

That said court has no jurisdiction of the subject of this action to establish by decree an independent, individual water right for irrigation and domestic purposes to waters flowing on said Flathead Indian Reservation as against the rights of the United States of America to said waters and the administration and apportionment thereof.

Wherefore this answering defendant prays that plaintiff's complaint in equity herein be dismissed

and that this answering defendant do have and recover of and from said plaintiff his costs and disbursements herein necessarily expended.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, United States Indian Irrigation Service.
Attorneys for Defendant Henry Gerharz

[31]

United States of America,
District of Montana,
County of Silver Bow—ss.

James H. Baldwin, being duly sworn on behalf of the defendant in the above-entitled action, says that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the said defendant is absent from the County of Silver Bow, where his attorney has his office, and that the affiant is one of the defendant's attorneys and therefore makes this affidavit.

JAMES H. BALDWIN

Subscribed and sworn to before me this 25th day of April, 1934.

[Seal] HAROLD L. ALLEN
Deputy Clerk U. S. District Court, District of Montana.

[Endorsed]: Filed April 25, 1934. [32]

Thereafter, on April 30, 1934, Reply to Answer of the United States was duly filed herein, being in the words and figures following, to-wit: [33]

[Title of District Court and Cause.]

REPLY TO ANSWER OF THE UNITED STATES OF AMERICA

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of The United States of America filed herein, denies each and every allegation therein made, as set forth in said answer, and in the First, Second, Third and Fourth affirmative defense as alleged therein and the whole thereof, except as set forth and alleged in her complaint filed herein.

Wherefore, plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 27th day of April, 1934.

[Seal] RALPH L. ARNOLD
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires December 18, 1934.

[Endorsed]: Filed April 30, 1934. [34]

Thereafter, on April 30, 1934, Reply to Answer of Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [35]

[Title of District Court and Cause.]

REPLY TO ANSWER OF HENRY GERHARZ

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Henry Gerharz filed herein, denies each and every allegation therein made, as set forth in said answer, and in the First, Second, Third and Fourth affirmative defense as alleged therein and the whole thereof, except as set forth and alleged in her complaint filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that

he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 27th day of April, 1934.

[Seal] RALPH L. ARNOLD
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires December 18, 1934.

[Endorsed]: Filed April 30, 1934. [36]

Thereafter, on May 7, 1934, Amended Bill of Exceptions of the United States was duly filed herein, being in the words and figures following, to-wit:

[37]

[Title of District Court and Cause.]

AMENDED BILL OF EXCEPTIONS OF THE UNITED STATES OF AMERICA

To Order of the Court of April 16th, 1934, denying its objection to jurisdiction:

Be it remembered, that

1. The above-named plaintiff filed her Complaint in Equity in the above-entitled court and action on February 13th, 1934. Said Complaint in Equity

after the title of court and cause is as follows, to-wit:

Now comes the above named plaintiff and files this her Complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation. [38]

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands.

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and

have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Agatha Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and on October 8, 1908 trusts patents were issued to both of the Indian allottees for their respective lands.

III.

That on or about the 15th day of April, 1900 said Indian allottees dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irrigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same [39] was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators

of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned.

IV.

That on January 25, 1918 a fee patent was issued to said Indian allottee, Michel Pablo, for the lands allotted to him, and on October 5, 1916 a fee patent was issued to Agatha Pablo, allottee, for said lands allotted to her, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L p. 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary

irrigation of their lands or for domestic use of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriations and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit [40] of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims an interest in the waters flowing in said Mud Creek and has dammed up said Creek and carries part of the waters away from plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United

States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L p. 418), for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined. [41]

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's head gate and preventing the waters from flowing in plaintiff's ditch and to de-

prive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to

sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug [42] and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY
Attorney for Plaintiff.

State of Montana,
County of Lake—ss.

Agnes McIntire, being first duly sworn according to law, deposes and says:

That she is the plaintiff in the foregoing action; that she has heard read the foregoing complaint and that the matters and things therein stated are true of her own knowledge, except as to matters stated upon information and belief, and as to such matters she believes them to be true.

AGNES McINTIRE

Subscribed and sworn to before me this 10th day of February, 1934.

[Seal] LLOYD I. WALLACE
Notary Public for the State of Montana. Residing at Polson, Montana.

My commission expires August 1, 1934.

2. That thereafter, and on that day, a subpoena in equity issued out of the above-entitled court, in the above-entitled cause. Said Subpoena in Equity is in words and figures as follows, to-wit:

United States District Court
Missoula Division—District of Montana.

The President of the United States of America to the United States of America, Harold L. Ickes, Secretary of Interior and Henry Gerharz, Project Manager of Flathead Reclamation Project, Greeting: [43]

You Are Hereby Commanded that all excuses and delays set aside you within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Montana, at Helena, Montana, answer or otherwise plead unto the bill of complaint of Agnes McIntire, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Geo. M. Bourquin, United States District Judge at Helena, Montana, this 13th day of February, A. D. 1934.

[Seal] C. R. CARLOW,
Clerk.
By H. H. WALKER,
Deputy Clerk.

MEMORANDUM

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

ELMER E. HERSHEY,
Missoula, Montana,
Attorney for Plaintiff.

3. That thereafter and on March 20, 1934, the plaintiff above-named caused to be filed in the above-entitled court and cause the affidavit of Elmer E. Hershey which affidavit, after the title of court and cause is as follows:

State of Montana
County of Missoula—ss:

Elmer E. Hershey, being first duly sworn according to law, deposes and says:

That he caused a copy of the Bill of Complaint, filed in the above case, to be served upon the United States District Attorney for the District of Montana, on the 13th day of February, 1934, by depositing in the United States postoffice at Missoula, Montana, a full, true and correct copy of said Bill of Complaint securely sealed, postage prepaid and registered, and addressed to said United States Attorney at Helena, Montana, and the same was received by him on February 14, 1934, as evidenced by his return [44] receipt showing such service, attached hereto and made a part of this affidavit.

That on February 13, 1934, he mailed a copy of said Bill of Complaint by registered letter to the Attorney General of the United States at Washington, D. C., and the same was received by him on February 16, 1934, as evidenced by the return receipt, which is attached hereto and made a part of this affidavit.

That on February 13, 1934, he addressed a letter to the Secretary of the Interior inclosing a copy of said Bill of Complaint by registered mail, a copy of which letter is attached hereto and made a part hereof. That the same was received by the Secretary of the Interior on February 17, 1934, as is evidenced by his return receipt which is attached hereto and made a part hereof.

ELMER E. HERSHEY.

Subscribed and sworn to before me this 20th day of March, 1934.

[Seal] RALPH L. ARNOLD

Notary Public for the State of Montana, Residing at Missoula, Montana.

My Commission expires December 18, 1934.

4. That on April 9th, 1934, said United States of America; served and filed in the above-entitled Court and cause its Special Appearance and Objection to Jurisdiction which after the title of court and cause is in words and figures as follows:

Comes now the defendant the United States of America, appearing specially and not voluntarily

herein and for the sole purpose only of objecting to the jurisdiction of the above entitled court in the above entitled suit over it and says:

That this Court does not have any jurisdiction over the United States of America as a party defendant in this action for the reason that the United States of America, without its consent, cannot be sued, and in this action has not consented to be sued. [45]

Wherefore, the United States of America prays that the complaint in this action be dismissed and held for naught as against it.

JAMES H. BALDWIN
United States Attorney for
the District of Montana.
ROY F. ALLAN
Assistant U. S. Attorney.
DONALD J. STOCKING
Assistant U. S. Attorney.

5. That said Special Appearance and Objection to Jurisdiction came duly and regularly on for hearing before the above-entitled court, the Honorable George M. Bourquin, Judge presiding, at the court room thereof, at Missoula, Montana, on April 16th, 1934, and thereafter and on that day said Objection to Jurisdiction was by the Court denied;

And now the defendant The United States of America, asks that this be settled, approved, signed,

order filed, and filed as its Amended Bill of Exceptions on said ruling of the Court.

JAMES H. BALDWIN
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

Approved and settled.
BOURQUIN, J.

[Endorsed]: Filed May 7, 1934. [46]

Thereafter, on May 7, 1934, Amended Bill of Exceptions of Harold L. Ickes, Secretary of the Interior, was duly filed herein, being in the words and figures following, to-wit: [47]

[Title of District Court and Cause.]

AMENDED BILL OF EXCEPTIONS OF HAROLD L. ICKES, SECRETARY OF THE INTERIOR

To Order of the Court of April 16th, 1934, denying his objection to jurisdiction:

Be it remembered, that

1. The above-named plaintiff filed her Complaint in Equity in the above-entitled court and action on February 13th, 1934. Said complaint in Equity after the title of court and cause is as follows, to-wit:

Now comes the above named plaintiff and files this her Complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation. [48]

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands.

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial

irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Agatha Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and on October 8, 1908 trusts patents were issued to both of the Indian allottees for their respective lands.

III.

That on or about the 15th day of April, 1900 said Indian allottees dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same [49] was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred

sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned.

IV.

That on January 25, 1918 a fee patent was issued to said Indian allottee, Michel Pablo, for the lands allotted to him, and on October 5, 1916 a fee patent was issued to Agatha Pablo, allottee, for said lands allotted to her, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L. p. 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use of

any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriations and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit [50] of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims an interest in the waters flowing in said Mud Creek and has dammed up said Creek and carries part of the waters away from plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation

Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 418, for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined. [51]

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's head gate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her

said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one

hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug [52] and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Lake—ss.

Agnes McIntire, being first duly sworn according to law, deposes and says:

That she is the plaintiff in the foregoing action; that she has heard read the foregoing complaint and that the matters and things therein stated are true of her own knowledge, except as to matters stated upon information and belief, and as to such matters she believes them to be true.

AGNES McINTIRE

Subscribed and sworn to before me this 10th day of February, 1934.

[Seal] LLOYD I. WALLACE
Notary Public for the State of Montana.
Residing at Polson, Montana.

My Commission expires August 1, 1934.

2. That thereafter, and on that day, a subpoena in equity issued out of the above-entitled court, in the above-entitled cause. Said Subpoena in Equity is in words and figures as follows, to-wit:

United States District Court
Missoula Division—District of Montana

The President of the United States of America

To the United States of America, Harold L. Ickes, Secretary of Interior and Henry Gerharz, Project Manager of Flathead Reclamation Project, Greeting: [53]

You are hereby commanded that all excuses and delays set aside you within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the District of Montana, at Helena, Montana, answer or otherwise plead unto the bill of complaint of Agnes McIntire, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Geo. M. Bourquin, United States District Judge at Helena, Montana, this 13th day of February, A. D. 1934.

[Seal] C. R. GARLOW,
Clerk.
By H. H. WALKER,
Deputy Clerk.

MEMORANDUM

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after

service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

ELMER E. HERSHEY,
Missoula, Montana,
Attorney for Plaintiff.

3. That thereafter, and on March 22nd, 1934, the above-named plaintiff filed in the above-entitled court and cause her Motion which, after the title of court and cause is as follows:

Now comes the above-named plaintiff and moves the Court that an order be made directing defendant, Harold L. Ickes, Secretary of the Interior, to appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Section 57 of the Judicial Code of the United States (36 Stat. L. 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of the complaint filed herein together with a copy of said order be forthwith served upon said defendant.

Said defendant Harold L. Ickes, Secretary of the Interior, is not an inhabitant of the District of Montana, and has failed to voluntarily appear in said action, although requested to do so in a letter addressed to said defendant on February 13, 1934, inclosing a copy of said complaint, which letter was registered and the [54] return card shows that the same was received on February 17, 1934.

Dated March 22, 1934.

ELMER E. HERSHEY
Attorney for Plaintiff.

The Court thereupon made an order which after the title of court and cause is as follows:

Upon application of Elmer E. Hershey, Attorney for plaintiff, and upon the records and files in said case.

It is ordered that said Harold L. Ickes, Secretary of the Interior, defendant herein, appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Sec. 57 of the Judicial Code of the United States (36 Stat. L. 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of this order, together with a copy of the complaint, be served upon said defendant forthwith.

Dated this 23rd day of March, 1934.

BOURQUIN
Judge

[Endorsed]: Filed and entered March 23, 1934. C. R. Garlow, Clerk.

That said order, together with a copy of the bill of complaint, was served upon said defendant by the United States Marshal at Washington, D. C. on March 30, 1934.

4. That on April 9th, 1934, said Harold L. Ickes, Secretary of the Interior, served and filed in the above-entitled court and cause his Special Appearance and Objection to Jurisdiction which after the title of court and cause is in words and figures as follows: [55]

Comes now Harold L. Ickes, Secretary of the Interior, appearing specially and not voluntarily

herein, and for the sole purpose only of objecting to the jurisdiction of the above-entitled court in the above-entitled suit over him says:

1. That said Court does not have any jurisdiction over him as a party defendant in said suit for the reason that the same is brought against him in a district court other than that of the district whereof he is an inhabitant.

2. That this suit is essentially and substantially, despite the alleged joinder of the Secretary of the Interior, a suit against the United States of America and is therefore beyond the jurisdiction of this Court, for the reason that the United States without its consent cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged Complaint in this suit be dismissed and held for naught as against him.

JAMES H. BALDWIN,
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

5. That said Special Appearance and Objection to Jurisdiction came duly and regularly on for hearing before the above-entitled court, the Honorable George M. Bourquin, Judge presiding, at the court room thereof, at Missoula, Montana, on April 16th,

1934, and thereafter and on that day said Objection to Jurisdiction was by the Court denied;

And now the defendant Harold L. Ickes, Secretary of the Interior, asks that this be settled, approved, allowed, signed, order filed, and filed as his Amended Bill of Exceptions on said ruling of the Court.

JAMES H. BALDWIN
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, U. S. Indian Irrigation Service.

Approved and settled.
BOURQUIN, J.

[Endorsed]: Filed May 7, 1934. [56]

Thereafter, on July 25, 1934, an Order granting Plaintiff leave to file an Amended Complaint and time for Defts. to appear in response thereto was duly entered herein, the minute entry thereof being in the words and figures following, to-wit: [57]

[Title of District Court and Cause.]

Counsel for the respective parties present in court, Mr. Elmer E. Hershey appearing for the plaintiff and Mr. James H. Baldwin, U. S. District Attorney, appearing for the defendants the United States and Henry Gerharz.

Thereupon, on the motion of Mr. Hershey, and there being no objection by the District Attorney, the plaintiff was granted leave to file an amended complaint herein, it being agreed and ordered that the defendants the United States and Henry Gerharz shall have thirty days in which to appear in response to the amended complaint, and that if they do not so appear the answers heretofore filed shall stand and be considered as answers to the amended complaint.

Entered in open court July 25, 1934.

C. R. GARLOW,
Clerk. [58]

Thereafter, on July 25, 1934, an Amended Complaint in Equity was duly filed herein, being in the words and figures following, to-wit: [59]

[Title of District Court and Cause.]

AMENDED COMPLAINT IN EQUITY

Now comes the above named plaintiff and by leave of court first had and obtained files this her amended complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and Upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation which Treaty was duly ratified March

8, 1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. P. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands. [60]

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michael Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the North-east Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Mountain Meridian, and

Lizette Barnaby, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian.

III.

That on or about the 15th day of April, 1900 said Indian allottee, Michel Pablo who was then in the possession of said described land dug and constructed an irrigation ditch from Mud Creek, in Lake County, Montana, carrying one hundred sixty inches or four cubic feet of water per second of the waters from said Creek to their allotments above described for the purpose of irrigation their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned. [61]

IV.

That on January 25, 1918 a fee patent was issued to Agathy Pablo, wife of Michael Pablo, for the lands allotted to him, and on October 5, 1918 a fee patent was issued to Agatha Pablo, for said lands allotted to Lizette Barnaby, and thereafter said lands were sold and transferred to Plaintiff, and Plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L. p. 354) there was added by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906 and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, Defendant herein, claims [62] an interest in the waters flowing in said Mud Creek and has dammed up said Creek and carries part of the waters away from Plaintiff and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands.

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of

said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 416), for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined.

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right [63] to shut down plaintiff's headgate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss.

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XI.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That plaintiff has no plain, speedy or adequate remedy at law.

XIII.

That Alex Pablo and A. M. Sterling are each claiming that the appropriation of Michael Pablo as herein alleged was also made for additional lands now owned by them, and for this reason they are each made a defendant herein, in order that all rights, if any other than plaintiff's herein in said appropriation may be enquired into and the several rights in said ditch and the waters carried therein be fixed, partitioned, separated and established.

Wherefore, plaintiff prays that the defendant, The United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior

right to the use of said waters of one hundred sixty [64] inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY
Attorney for Plaintiff.

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 18th day of July, 1934.

[Seal] FRED D. WHISLER

Notary Public for the State of Montana, Residing at Missoula, Montana.

My Commission Expires July 8, 1935.

[Endorsed]: Filed July 25, 1934. [65]

Thereafter, on August 21, 1934, Motion to Dismiss the Amended Complaint by Defendants Alex Pablo and A. M. Sterling was duly filed herein, being in the words and figures following, to-wit: [66]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED COMPLAINT IN EQUITY

Now come the defendants, Alex Pablo and A. M. Sterling, two of the defendants in the above entitled action, and separately move the Court to dismiss the amended complaint in equity filed in the above entitled cause upon grounds and reasons therefor as follows:

I.

That there is insufficiency of fact alleged in said Amended Complaint in Equity to constitute a valid cause of action in equity against the said defendants, or either of them.

JOHN P. SWEE

Ronan, Montana.

Solicitor for said defendants.

Service of the foregoing Motion to Dismiss Amended complaint in Equity accepted and receipt of copy acknowledged this 20th day of August, 1934.

ELMER E. HERSHEY
Attorney for Plaintiff.

[Endorsed]: Filed August 21, 1934. [67]

Thereafter, on March 20, 1935, Motion for Judgment on the Pleadings by the United States was duly filed herein, being in the words and figures following, to-wit: [68]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS

Comes now the defendant and moves the Court that judgment be rendered for the defendant herein on the pleadings and as grounds for said motion, states:

I.

This Court is without jurisdiction of this case for the reason that this action is not one in which the United States of America has consented to be sued.

II.

That the facts stated in the amended bill of complaint in equity are insufficient to constitute a valid cause of action in equity against the United States of America.

III.

That the above entitled Court is without jurisdiction or authority to proceed further in this ac-

tion for want of necessary parties, for this, that there are numerous users of the waters of Mud Creek, whose lands are situate thereon and adjacent thereto and both above and below the lands described in the complaint in equity herein, whose rights to the use of the waters of said creek may be injuriously affected by any decree that the above entitled court may render or enter in the above entitled cause and whose presence either as parties plaintiff or defendant in this action is necessary and proper to a complete determination of this [69] cause and of the issues of the right to and the amount or duty of water involved in this action.

IV.

That by reason of the execution of the repayment contract, entered into between the United States of America and the Flathead Irrigation District, in which district the lands of plaintiff are included, subjecting plaintiff to the terms and conditions of said repayment contract, plaintiff is estopped from obtaining a determination of her rights as against the United States, one of the parties to said repayment contract.

Dated this 20th day of March, 1935,

JAMES H. BALDWIN
United States Attorney for
District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Interior
Department, Indian Irrigation Service.
Attorneys for Defendant,
United States of America

[Endorsed]: Filed March 20, 1935. [70]

Thereafter, on May 7, 1936, Return of Service of Order on Secretary of the Interior was duly filed herein, being in the words and figures following, to-wit: [71]

[Title of District Court and Cause.]

ORDER

Upon application of Elmer E. Hershey, Attorney for plaintiff, and upon the records and files in said case,

It is ordered that said Harold L. Ickes, Secretary of the Interior, defendant herein, appear, plead, answer or demur by the 14th day of April, 1934, under the provisions of Sec. 57 of the Judicial Code of the United States (36 Stat. L., 1102), (Title 28 U. S. C. A. Sec. 118), and that a copy of this order, together with a copy of the complaint, be served upon said defendant forthwith.

Dated this 23 day of March, 1934.

BOURQUIN,
Judge

[Endorsed]: Filed and entered March 23, 1934. C. R. Garlow, Clerk.

Attest a true copy.

[Seal] C. R. GARLOW,
Clerk.
By H. H. WALKER,
Deputy.

U. S. Marshal's Office
Washington, D. C.

March 31, 1934.

Served copy of the within Order together with a copy of the bill of complaint in said case on Harold L. Ickes, Secretary of the Interior, by personal service of the same on Harry Slattery, Assistant to the Secretary of the Interior, March 30, 1934.

EDGAR C. SNYDER
U. S. Marshal, District of Columbia
By THOMAS R. EAST,
Deputy U. S. Marshal.

[Endorsed]: Filed May 7, 1936. [72]

Thereafter, on May 16, 1936, Amended Complaint in Equity was duly filed herein, being in the words and figures following, to-wit: [73]

In the District Court of the United States, for the District of Montana.

No. 1496.

AGNES McINTIRE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of Interior, HENRY GERHARZ, Project Manager of Flathead Reclamation Project, ALEX PABLO, A. M. STERLING, LOU GOODALE BIGELOW KROUT, ALPHONSE CLAIRMONT, FLATHEAD IRRIGATION DISTRICT, a corporation, ALICE CLAIRMONT COWAN, VICTOR LEONARD CLAIRMONT, HENRY CLAIRMONT, JAMES C. & ELIZABETH TVARUZEK, FLORENCE CLAIRMONT, ERNEST CLAIRMONT, GRACE CLAIRMONT, B. D. LIEBEL, PETER OLIVER DUPUIS, MARY PABLO, CHAS. FERGUSON, FRED & EMIL KLOSSNER, EMANUEL HUBER, JOSEPH A. PAQUETTE, FRED C. GUENZLER, ANNIE RAITOR, CLARENCE BILILE, ALEX SLOAN, JACOB M. REMIERS, Administrator of

Estate of R. W. JAMISON, deceased, GEORGE SLOANE, HATTIE ROSE SLOAN HASTINGS, HELGA VESSEY, E. D. HENDRICKS, LILLIAN CLAIRMONT THOMAS, EUGENE CLAIRMONT, EDWIN DUPUIS, GERTRUDE E. STIMSON, W. B. DEMMICK, ROSE ASHLEY, HENRY ASHLEY and W. A. DUPUIS,

Defendants.

AMENDED COMPLAINT IN EQUITY.

Now comes the above named plaintiff and by leave of court first had and obtained files this her amended complaint, and for cause of action alleges:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and upper Pend d' Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation, which Treaty was duly ratified March 8, 1859, and proclaimed by the President of the United [74] States, April 18, 1859, (12 Stat. L. P. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent

homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands.

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the West Half of the Northeast Quarter, Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian, and Lizette Barnaby, a Flathead Indian of the Flathead Tribe or Nation of Indians, made allotment for the East Half of the Northeast Quarter Section Fourteen, Township Twenty-one, North of Range Twenty, West Montana Meridian.

III.

That on or about the 15th day of April, 1900, said [75] Indian allotee, Michel Pablo who was then in the possession of said described land dug and constructed an irrigation ditch from Mud Creek, in

Lake County, Montana, carrying one hundred sixty inches, or four cubic feet of water per second of the waters from said creek to their allotments above described for the purpose of irrigating their said lands above described. That said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one, North Range Twenty West, long prior to the survey thereof and while the same was unoccupied and unclaimed lands, that said ditch was of sufficient size to carry said water and said Indian allottees thereby became the appropriators of one hundred sixty inches or four cubic feet of the waters of Mud Creek on April 15, 1900, and the same has become appurtenant to said land and at no time since the appropriation thereof has the same been abandoned.

IV.

That on January 25, 1918, a fee patent was issued to Agatha Pablo, wife of Michael Pablo, for the lands allotted to him, and on October 5, 1918, a fee patent was issued to Agatha Pablo for said lands allotted to Lizette Barnaby, and thereafter said lands were sold and transferred to plaintiff, and plaintiff is now the owner in fee of said lands allotted and patented to both of the said Indians together with one hundred sixty inches or four cubic feet of water per second of water appurtenant thereto, appropriated as aforesaid, for the irrigation of said lands.

V.

That on June 21, 1906 (34 Stat. L. P. 354) there was added [76] by Congress of the United States to the provisions of an Act approved April 23, 1904, providing for the allotment of the lands on said Flathead Indian Reservation and the opening of the same for sale and disposal Sections 17, 18, 19 and 20. Section 19 being as follows:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

That from April 15, 1900 continuous up to and including June 21, 1906, and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands herein described in conveying the waters from said Mud Creek to said lands, and this plaintiff claims the benefit of said Act of Congress in the use and possession of said one hundred sixty inches or four cubic feet of water per second of waters carried in said ditch.

VI.

That the United States of America, defendant herein, claims an interest in the waters flowing in

said Mud Creek and has dammed up said creek and carries part of the waters away from plaintiff, and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States, and that the United States, under the provisions of said Act of June 21, 1906, has no right to deprive plaintiff of any waters required by her for the necessary irrigation of her lands. [77]

VII.

That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 416) for the purpose of completing adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

VIII.

That Harold L. Ickes, Secretary of the Interior, is claiming to be in charge, under various Acts of Congress, of said Flathead Indian Irrigation Project, and Henry Gerharz is claiming to be the Project

Manager in direct charge of said Irrigation Project, and that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined.

IX.

That said defendants wrongfully and without right are claiming that this plaintiff has no water rights on Mud Creek independent of the Indian Irrigation Project, and is claiming the right to shut down plaintiff's headgate and preventing the waters from flowing in plaintiff's ditch and to deprive plaintiff of the use of said water upon her said lands, except by paying to said Flathead Indian Irrigation Project fees and charges, to plaintiff's great damage and loss. [78]

X.

That the value of the water in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3000.00).

XL.

That this action in equity is necessary to prevent a multiplicity of suits.

XII.

That the plaintiff has no plain, speedy or adequate remedy at law.

XIII.

That Alex Pablo and A. M. Sterling are each claiming that the appropriation of Michael Pablo as herein alleged was also made for additional lands

now owned by them, and for this reason they are each made a defendant herein, in order that all rights, if any other than plaintiff's herein in said appropriation may be enquired into and the several rights in said ditch and the waters carried therein be fixed, partitioned, separated and established.

XIV.

That the Flathead Irrigation District is a corporation, duly incorporated under the laws of the State of Montana.

XV.

That defendants Lou Bigelow Krout, Alphonse Clairmont, Flathead Irrigation District, a corporation, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, James C. & Elizabeth Tvaruzek, Florence Clairmont, Ernest Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. [79] Remiers, Administrator of the Estate of R. W. Jamison, deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. D. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, W. A. Dupuis, Gertrude E. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley at one time claimed some rights to the waters flowing in Mud Creek, or some interest therein, and are made defendants herein in order that they may have an opportunity to set forth their rights or interests, if any they have, in order that the entire

controversy over the waters in Mud Creek may be settled and disposed of.

Wherefore, plaintiff prays that the defendant, the United States of America, be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff, and plaintiff's right as herein set forth may be partitioned, separated, fixed and established, and that plaintiff be given a prior right to the use of said waters of one hundred sixty inches as of date April 15, 1900, and that said defendants and each of them be forever restrained from interfering with the rights of plaintiff as so found, and that the plaintiff be given the right to sufficient water for the proper irrigation of her land and other beneficial use thereon to the extent of one hundred sixty inches or four cubic feet of water per second of the waters of Mud Creek through the irrigation ditch dug and constructed as herein set forth, and that plaintiff have such other and further relief in the premises as may to the Court seem meet and in accordance with equity and good conscience, and for costs of suit.

ELMER E. HERSHEY,
Attorney for Plaintiff. [80]

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above entitled action, says that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the said plaintiff is absent from the County of Missoula, where her attorney has his office, and he therefore makes this affidavit as her attorney.

ELMER E. HERSHEY

Subscribed and sworn to before me this 13th day of May, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed May 16, 1936. [81]

Thereafter, on June 5, 1936, Special Appearance and Objection to Jurisdiction by the United States, was duly filed herein, being in the words and figures following, to-wit: [82]

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant, The United States of America, appearing specially and not voluntarily

herein and for the sole purpose only of objecting to the jurisdiction of the above entitled Court in the above entitled suit over it and says:

I.

That this Court does not have any jurisdiction over the United States of America as a party defendant in this action for the reason that the United States of America, without its consent, cannot be sued, and in this action has not consented to be sued.

Wherefore, The United States of America prays that the Amended Complaint in this action be dismissed and held for naught [83] as against it.

JOHN B. TANSIL
United States Attorney for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Department Interior, United States Indian Irrigation Service.

[Endorsed]: Filed June 5, 1936. [84]

Thereafter, on June 5, 1936, Special Appearance and Objection to Jurisdiction by Deft. Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [85]

[Title of District Court and Cause.]

SPECIAL APPEARANCE AND OBJECTION TO JURISDICTION

Comes now the defendant, Henry Gerharz, as denominated in the Amended Bill of Complaint, Project Manager of Flathead Reclamation Project, and appearing specially and not voluntarily herein and for the purpose of objecting to the jurisdiction of the above entitled Court in the above entitled suit over him says:

I.

That the Amended Bill of Complaint in said action fails to state facts sufficient to constitute a cause of action in equity or otherwise against Henry Gerharz in his denominated capacity in said Amended Bill of Complaint as Project Manager of Flathead Reclamation Project or otherwise, and does not state facts sufficient [86] to entitle the plaintiff to any relief as against Henry Gerharz as Project Manager or otherwise.

II.

That this suit is essentially and substantially, despite the alleged joinder of Henry Gerharz in his denominated capacity in the said Amended Bill of Complaint, as Project Manager of Flathead Reclamation Project, a suit against the United States of America and is therefore beyond the jurisdiction of this Court for the reason that the United States, without its consent, cannot be sued and in this action it has not consented to be sued.

Wherefore, he prays that the alleged Amended Complaint in this suit be dismissed and held for naught as against him.

JOHN B. TANSIL,
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS,
District Counsel, Department of Interior, United States Indian Irrigation Service.

[Endorsed]: Filed June 5, 1936. [87]

Thereafter, on June 9, 1936, Motion to Dismiss by Flathead Irrigation District was duly filed herein, being in the words and figures following, to-wit: [88]

[Title of District Court and Cause.]

MOTION TO DISMISS.

Comes now Flathead Irrigation District, one of the defendants in the above entitled action, and moves the Court to dismiss the bill of complaint filed in the above entitled cause for the reason and on the ground that there is insufficiency of facts therein to constitute a valid cause of action in equity against this defendant.

WALTER L. POPE,
RUSSELL E. SMITH,
Solicitors for Defendant,
Flathead Irrigation District. [89]

Service of the foregoing Motion to Dismiss accepted and receipt of copy acknowledged this 8th day of June, 1936.

ELMER E. HERSHEY,
Attorney for Plaintiff.

[Endorsed]: Filed June 9, 1936. [90]

Thereafter, on June 10, 1936, Motion to Dismiss by Defendants, members of the Flathead Tribe of Indians, was duly filed herein, being in the words and figures following, to-wit: [91]

[Title of District Court and Cause.]

MOTION TO DISMISS.

Come now the defendants, Alex Pablo, Alphonse Clairmont, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, Florence Clairmont, Ernest Clairmont, Grace Clairmont, Peter Oliver Dupuis, Mary Pablo, Alex Sloan, George Sloane, Hattie Rose Sloan Hastings, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Rose Ashley, Henry Ashley and W. A. Dupuis, members of the Flathead tribe of Indians and wards of the United States of America, by and through the United States Attorney for the District of Montana, move the above entitled Court to dismiss said action as against them and as grounds for their motion allege: [92]

I.

That the alleged amended complaint in said action fails to state facts sufficient to constitute a cause of action in equity or otherwise against these defendants, and does not state facts sufficient to entitle plaintiff to any relief against said defendants.

Wherefore, these defendants pray that the alleged amended complaint in this suit be dismissed and held for naught as against them.

JOHN B. TANSIL,
United States District Attorney.
KENNETH R. L. SIMMONS,
District Counsel, Department of the Interior, U. S. I. I. S.,
Attorneys for above defendants.

[Endorsed]: Filed June 10, 1936. [93]

Thereafter, on November 23, 1936, Answer of the United States to Amended Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [94]

[Title of District Court and Cause.]

ANSWER.

Comes now the United States of America, one of the defendants in the above entitled action, and for its answer to the amended bill of complaint in equity on file herein, alleges:

I.

For a first affirmative defense that this action is not one in which the United States of America has consented to be sued.

II.

For a second affirmative defense, that the action was not one brought for the partition of lands. [95]

III.

For a third affirmative defense, that this action is in fact and legal effect one brought to settle the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek on the Flathead Indian Reservation in the State and District of Montana.

IV.

For a fourth affirmative defense, that the facts stated therein are insufficient to constitute a valid cause of action in equity against the answering defendant.

Wherefore, having fully answered, the United States of America prays:

1. That Plaintiff take nothing by her action;
2. That the United States of America have judgment against plaintiff for its costs and disbursements herein necessarily expended.
3. For such other and further relief as may be fit and proper in the premises.

ROY F. ALLAN
Asst. United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, United States Indian Irrigation Service. [96]

United States of America,
District of Montana,
County of Silver Bow—ss.

Roy F. Allan, being duly sworn on oath, deposes and says:

That he is the Asst. United States Attorney for the District of Montana, and as such makes this verification to the foregoing answer;

That he has read the same and knows the contents thereof and the same is true to the best of his knowledge, information and belief.

ROY F. ALLAN

Subscribed and sworn to before me this 19th day of November, 1936.

[Seal] HAROLD L. ALLEN
Deputy Clerk, U. S. District Court
District of Montana

[Endorsed]: Filed Nov. 23, 1936. [97]

Thereafter, on November 23, 1936, Answer of Henry Gerharz to Amended Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [98]

[Title of District Court and Cause.]

ANSWER

Comes now Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of Flathead Reclamation

Project and for answer to the amended bill of complaint in equity herein alleges:

I.

Defendant admits the allegations contained in Paragraph I of plaintiff's amended bill of complaint save and except the allegation that "one inch of water per acre is necessary for the proper irrigation of said lands". As to this allegation, defendant states that he is without knowledge. [99]

Defendant alleges that the Flathead Indian Irrigation Project is incorrectly designated in the title of this action and in certain paragraphs of the amended bill of complaint herein as Flathead Reclamation Project, and alleges that the said Project is subject, not to the Reclamation Laws, but to the Indian Irrigation Project Laws of the United States.

Defendant alleges by the establishment of the Flathead Reservation referred to in Paragraph I of plaintiff's amended bill of complaint, the United States, defendant herein, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial purposes upon the lands of said reservation and exempted from appropriation under territorial or state laws or otherwise, all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

II.

Defendant admits that Michel Pablo and Lizett Barnaby are Flathead Indians of the Flathead tribe or nation of Indians and that the United States designated the allotments described therein to said Indians.

III.

Defendant states that he is without knowledge as to any allegation contained in Paragraph III thereof.

IV.

Defendant states that he is without knowledge as to any allegation contained in Paragraph IV thereof.

V.

Defendant admits the enactment into the laws of the United States the provision of Section 19 of the Act of Congress of June 21, 1906 (34 Stat. L. 355) and except as hereinbefore specifically admitted, states that he is without knowledge as to [100] any allegation contained in Paragraph V thereof.

VI.

Defendant admits that the United States of America claims an interest in the waters flowing in said Mud Creek and has dammed up said creek, and except as hereinbefore specifically admitted, states that he is without knowledge as to any other allegation contained in Paragraph VI thereof.

VII.

Defendant denies that there are no other parties using the waters of Mud Creek except plaintiff and

the United States of America, and in this connection alleges that there are numerous users of the waters of Mud Creek whose lands are situated both above, below and adjacent to the lands described in the amended bill of complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause; and except as hereinbefore specifically denied or qualified states that he is without knowledge as to any allegation contained in Paragraph VII thereof.

VIII.

Defendant alleges that all acts done by this answering defendant in regard to lands and waters mentioned in said amended complaint in equity were and are and will continue to be proper and lawful acts done in pursuance of the orders, rules and regulations of the Secretary of the Interior of the United States of America, made and promulgated by said Secretary under and by virtue of the authority vested in him by the laws and statutes of the United States of America to carry the same into effect.

IV.

Defendant denies that he has ever wrongfully or [101] without right claimed that plaintiff has no water right on Mud Creek independent of the Flathead Indian Irrigation Project and denies that he has unlawfully claimed the right to shut out plain-

tiff's headgate or to prevent waters from flowing into plaintiff's ditch or to deprive plaintiff of the use of said waters upon said lands, except by paying to said Flathead Irrigation Project fees and charges.

Defendant, however, admits and avers that in the course of his employment as Project Engineer of the Flathead Indian Irrigation Project, acting under the direction and authority of the Secretary of the Interior, pursuant to laws and statutes of the United States, he assessed against a portion of said lands claimed by plaintiff, certain charges for construction, operation and maintenance of the Flathead Irrigation System and further alleges that said charges and each thereof were and are lawful and proper;

Defendant further alleges that on August 26, 1926, an order was duly given, made and entered of record in the District Court of the Fourth Judicial District of the State of Montana in and for the counties of Lake and Sanders in a proceeding entitled "In the Matter of the Formation of the Flathead Irrigation District" including the following described portion of the lands claimed by plaintiff herein in the Flathead Irrigation District, to-wit:

> West Half (W½) of Northeast Quarter (NE¼) of Section 14, in Township 21 North of Range 20 West, of the Montana Principal Meridian, in Lake County, Montana.

That subsequently said Flathead Irrigation District entered into a repayment contract, and First,

Second and Third supplemental contracts with the United States of America and the above described lands became and are now subject to the terms and conditions of such repayment contract and said supplemental contracts. [102]

X.

Defendant states that he is without knowledge of the value of the water mentioned in the amended bill of complaint in equity herein.

XI.

Defendant denies that this action is necessary to prevent a multiplicity of suits.

XII.

Defendant denies that plaintiff has no plain, speedy or adequate remedy at law.

XIII.

Defendant states that he is without knowledge as to any allegation contained in Paragraph XIII thereof.

XIV.

Defendant admits the allegations contained in Paragraph XIV thereof.

XV.

Defendant states he is without knowledge as to any allegation contained in Paragraph XV thereof. Defendant alleges that whatever rights, if any, these defendants have to the use of the waters of Mud

Creek are subservient to the rights of the United States of America, defendant herein, and whatever rights, if any, they have were granted them by the United States of America pursuant to Federal statutes.

XVI.

Defendant denies each and every allegation contained therein which is not hereinbefore specifically admitted, qualified or denied.

First Affirmative Defense.

For a further answer and by way of a first affirmative defense this answering defendant says: [103]

That this action is not one of the partition of lands, but is in truth and in fact and in law an action to quiet title to the use of water.

Second Affirmative Defense.

For a further and second affirmative defense, defendant says:

That the facts stated in the amended bill of complaint in equity herein are insufficient to constitute a valid cause of action in equity as against this answering defendant.

Third Affirmative Defense.

For a further and third affirmative defense, defendant says:

That said court has no jurisdiction of the subject of this action to establish by decree an independent, individual water right for irrigation and domestic

purposes to waters flowing on said Flathead Indian Reservation as against the rights of the United States of America to said waters and the administration and apportionment thereof.

Fourth Affirmative Defense.

For a further and fourth affirmative defense, defendant says:

That by a treaty between the United States and the Confederated tribes of Flathead, Kootenai and Upper Pend d'Oreilles Indians made July 16, 1855 (12 Stats. 975) ratified March 8, 1859 and proclaimed April 15, 1859, the Confederated tribes ceded, released and conveyed to the United States all their right, title and interest in and to a large portion of the country then occupied or claimed by them being in what is now the northwestern part of the State of Montana; and the United States set aside and there reserved for the exclusive use, benefit and occupancy of the said Confederated tribes and as a [104] general Indian Reservation, upon which might be placed other friendly tribes and bands of Indians, a part of the lands so ceded and relinquished, which part so set aside and reserved as an Indian reservation is designated and known as the Flathead Indian Reservation. The purpose and effect of this treaty was, in keeping with the general Indian policy of the United States, to enable these Indians to abandon their habits as a nomadic and uncivilized people and to become a self-supporting agricultural and civilized people with perma-

nent homes on lands thereafterwards to be allotted to them in severalty. The lands of said reservation are arid and without artificial irrigation are valueless for farming and the growing of agricultural crops thereon; and said reservation was and is too small in area to enable these Indians to support themselves as a nomadic and uncivilized people as they had theretofore lived and supported themselves upon the much larger area occupied and claimed by them. Upon the making of said treaty the said Confederated bands of Indians removed to settled upon and have thereafter remained upon and occupied said Indian reservation and began and have continued to support themselves by farming and the growing of agricultural crops upon the lands of said reservation by means of artificial irrigation with the waters flowing upon said reservation. By the establishment of this reservation the United States, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial uses upon the lands of said reservation and exempted from appropriation under territorial and state laws or otherwise, all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

That pursuant to the Acts of Congress of April 23, 1904 (33 Stat. L. 305), June 21, 1906 (34 Stat. L. 354), and April 30, 1908 (35 Stat. L. 70 83), the United States commenced the construction of the Flathead Irrigation Project to irrigate the [105]

irrigable lands on the Flathead Indian Reservation in Montana most susceptible of and best adapted to irrigation and farming. That by virtue of the Act of Congress of April 30, 1908, the sum of $50,000 was appropriated from public monies for preliminary surveys, plans and estimates of irrigating systems to irrigate the lands allotted by the Act of Congress of April 23, 1904, and the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of said irrigation project system.

That in succeeding years, by subsequent Acts of Congress, further amounts were appropriated for the construction, operation and maintenance of the irrigation system thus commenced; that up to June 30, 1936, the United States had expended the sum of $7,499,105.85 for the construction of the Flathead Indian Irrigation Project in Montana; and that the United States now owns, operates and is in control of the Flathead Indian Irrigation Project.

That pursuant to Section VII of the General Allotment Act of Congress of February 8, 1887 (24 Stat. L., 388), and of the Acts of Congress aforesaid of April 23, 1904, June 21, 1906 and April 30, 1908, the Secretary of the Interior, as the Agent of the United States, designated the lands on the Flathead Indian Reservation which were to receive water deliveries from the Flathead Indian Irrigation Project system. That all of said lands are classified as irrigable lands, subject to their pro rata share of the waters distributed by the Flathead

Indian Irrigation Project system. That a portion of the lands of the defendant described herein have been classified as irrigable by the Secretary of the Interior and lie under said irrigation system and are subject to water deliveries therefrom.

That all of the waters of streams bordering upon and flowing through the Flathead Indian Reservation, including the waters of Mud Creek, are used by the Flathead Indian Irrigation Project system and are necessary for the proper irrigation of [106] lands lying thereunder, designated as irrigable by the Secretary of the Interior and subject to water deliveries therefrom.

That the only right plaintiff, or her predecessors in interest, ever had to use said waters or any part thereof, was and is the right to use for irrigation and other beneficial purposes, the amount of said waters apportioned and distributed to them, or to her, under the laws of the United States and the rules and regulations of the Secretary of the Interior of the United States Government, subject to lawful charges for operation, maintenance and construction of said project thereunder; and that neither the said water, nor any part thereof, on said Indian Reservation, was or could be appropriated, or title thereto acquired by plaintiff, or by his alleged predecessors, or by any person.

That pursuant to the Acts of Congress of June 21, 1906 (34 Stat. 354), and May 29, 1908 (35 Stat. 448), the United States, through its designated agent, the Secretary of the Interior, recognized all

early water right developments of Indians and white settlers on the Flathead Indian Reservation in Montana which had been made prior to the year 1909.

That a committee appointed by the Secretary of the Interior made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909.

That on December 10, 1919, this committee reported to the Secretary of the Interior in regard to early developments of water rights on Mud Creek and other streams within the boundaries of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior issued pursuant to law. That the report [107] of said committee and its recommendations were approved by said Secretary on November 25, 1921.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water right from Mud Creek to the lands of Michel Pablo, being allotment No. 1148, comprising the West Half (W½) of the Northeast Quarter (NE¼) of Section Fourteen (14), Township Twenty-one (21) North, Range Twenty (20) West, Montana Principal Meridian, to the extent of one thousand (1000) gallons per day

for domestic and stock uses. That pursuant to said Acts of Congress, the Secretary of the Interior, on November 25, 1921, further declared that no other water right of any kind is appurtenant to this allotment.

That save and except the rights plaintiff acquired under the Flathead repayment contract and said supplemental contracts to water deliveries from the Flathead Indian Irrigation Project system, subject to assessments and charges made under said contracts with the United States, this right to the use of one thousand (1000) gallons of water per day for domestic and stock use is the only right ever granted said allotment by the United States.

Fifth Affirmative Defense

For a further and fifth affirmative defense, defendant says:

That as a further notice to all landowners and settlers along Mud Creek that the United States was the sole owner of the waters flowing therein and of the right to the use of the same, pursuant to the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), and under and by virtue of an Act of the Legislative Assembly of the State of Montana, entitled: "An Act authorizing the Government of the United States to appropriate the water of the streams of the State of Montana * * *" approved February 27, 1905 (Revised Codes of Montana, 1921, Section 7099), [108] the United States through H. N. Savage, Supervising Engineer, U. S. Reclamation Service, thereunto duly

authorized by the Secretary of the Interior of the United States in that behalf, did make the following appropriations of the waters of Mud Creek and its tributaries:

Date of Appropriation	Amount of Appropriation	Date of Recordation in Office of County Clerk & Recorder, Montana Flathead County	Vol. & Page Recorded in Book of Water Rights
Dec. 27, 1909	20 cubic feet of water per second of time.	Jan. 28, 1910	Vol. 90, p. 510
Dec. 27, 1909	20 " " " "	Jan. 28, 1910	Vol. 90, p. 511
Dec. 27, 1909	20 " " " "	Jan. 28, 1910	Vol. 90, p. 510
Dec. 27, 1909	50 " " " "	Jan. 28, 1910	Vol. 90, p. 510
Dec. 27, 1909	200 " " " "	Jan. 28, 1910	Vol. 90, p. 512
April 4, 1912	200 " " " "	April 4, 1913	Vol. 71, p. 471
		Missoula County	
April 4, 1912	100 " " " "	April 7, 1913	Vol. J, p. 11

That the United States applied these waters to beneficial use within the time specified by the laws of the State of Montana and for the purposes as set out in the aforesaid Notices of Appropriation; that the United States has continuously used and is now using all of the waters of Mud Creek in its Flathead Irrigation Project system.

That the United States, long prior to and since the aforesaid dates of appropriation of the waters of Mud Creek and its tributaries, has continuously applied to beneficial use through the Flathead Irrigation Project system all of the waters of said streams.

Sixth Affirmative Defense.

For a further and sixth affirmative defense, defendant says:

That the United States has continuously and at all times since about the year 1855 and for a period greatly exceeding ten years prior to the filing of this action, had asserted and exercised the actual, visible, open, notorious and exclusive ownership, possession and control of all the waters of said Mud Creek, under claim of title in the United States as [109] aforesaid and hostile to the claims of all other persons whomsoever; that for a period of more than ten years immediately preceding the filing of this action the United States has by means of reservoirs, dams, ditches, flumes, headgates and other works under the Flathead Indian Irrigation Project, taken actual physical possession and control of all of said waters and has at all times during said period exercised entire dominion over and ownership of the said waters and water-rights, and has delivered such waters to actual users thereof only under the statutes and laws of the United States and the rules and regulations of the Secretary of the Interior relative to said Flathead Indian Irrigation Project, and not otherwise; that at all times during said period of more than ten years immediately preceding the filing of this action, the plaintiff and his predecessors have been permitted by the United States to use only such waters as have been delivered to them by it under said project and pursuant to the grant of the United States through the Secretary of the Interior to one thousand gallons of water per day for domestic and stock use; that during the whole of said period the plaintiff and his predecessors have used said waters only with the permission and consent of the United States and

subject to its asserted title thereto, and not under claim of title in themselves or adverse to the title of said United States.

That by reason of the premises the United States has title by adverse possession in and to all the waters mentioned in plaintiff's complaint, and in and to all the waters of Mud Creek as against any possible claim of title in plaintiff.

That by reason of the premises the plaintiff is barred by the provisions of Sections 9015, 9016, 9018 and 9041 of the Revised Codes of the State of Montana 1935, from asserting any right, title or interest in or to said waters or water-rights adverse to the United States or to this defendant.

That by reason of the premises the plaintiff has been guilty of laches and should not now be heard in equity to set up [110] or assert any right, title or interest in or to said waters or water-rights adverse to the United States or to this defendant.

Wherefore this answering defendant prays that plaintiff's amended complaint in equity herein be dismissed and that this answering defendant do have and recover of and from said plaintiff his costs and disbursements herein necessarily expended.

ROY F. ALLAN
Asst. United States Attorney
for the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Department of
the Interior, United States
Indian Irrigation Service.
Attorneys for Defendant Henry Gerharz

[111]

United States of America,
District of Montana,
County of Silver Bow—ss.

Roy F. Allan, being duly sworn on behalf of the defendant in the above-entitled action, says that he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the said defendant is absent from the County of Silver Bow, where his attorney has his offices, and that the affiant is one of the defendant's attorneys and therefore makes this affidavit.

ROY F. ALLAN

Subscribed and sworn to before me this 19th day of November, 1936.

[Seal] HAROLD L. ALLEN
Deputy Clerk, U. S. District Court,
District of Montana

Due and legal service of the within Answer and receipt of a true copy thereof is hereby acknowledged this 23rd day of November, 1936.

ELMER E. HERSHEY
Attorney for Plaintiff

[Endorsed]: Filed Nov. 23, 1936. [112]

Thereafter, on November 23, 1936, Answer of Defts., members of the Flathead Tribe of Indians, to Amended Bill of Complaint, was duly filed herein, being in the words and figures following, to-wit: [113]

[Title of District Court and Cause.]

ANSWER.

Comes now the defendants, Alex Pablo, Alphonse Clairmont, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, Florence Clairmont, Ernest Clairmont, Grace Clairmont, Peter Oliver Dupuis, May Pablo, Alex Sloan, George Sloane, Hattie Rose Sloan Hastings, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Rose Ashley, Henry Ashley and W. A. Dupuis, members of the Flathead tribe of Indians and wards of the United States of America, by and through the United States District Attorney for the District of Montana, and for answer to the amended bill of complaint in equity herein allege: [114]

I.

Defendants admit the allegations contained in Paragraph I of plaintiff's amended bill of complaint, save and except the allegation that "one inch of water per acre is necessary for the proper irrigation of said lands". As to this allegation, defendants state that they are without knowledge.

Defendants allege by the establishment of the Flathead Reservation referred to in Paragraph I of plaintiff's amended bill of complaint, the United States, defendant herein, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial purposes upon the lands of said reservation and exempted from appropriation under territorial or state laws or otherwise, all of the

waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

II.

Defendants admit that Michel Pablo and Lizette Barnaby are Flathead Indians of the Flathead tribe or nation of Indians and that the United States designated the allotments described therein to said Indians.

III.

Defendants state that they are without knowledge as to any allegation contained in Paragraph III thereof.

IV.

Defendants state that they are without knowledge as to any allegation contained in Paragraph IV thereof.

V.

Defendants admit the enactment into the laws of the United States the provision of Section 19 of the Act of Congress of June 21, 1906 (34 Stat. L. 355) and except as hereinbefore specifically admitted, state that they are without knowledge as to any allegation contained in Paragraph V thereof.

[115]

VI.

Defendants admit that the United States of America claims an interest in the waters flowing in said Mud Creek and has dammed up said creek, and except as hereinbefore specifically admitted, state

that they are without knowledge as to any allegation contained in Paragraph VI thereof.

VII.

Defendants deny that there are no other parties using the waters of Mud Creek except plaintiff and the United States of America, and in this connection allege that there are numerous users of the waters of Mud Creek whose lands are situated both above, below and adjacent to the lands described in the amended bill of complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water, and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause, and except as hereinbefore specifically denied or qualified state that they are without knowledge as to any allegation contained in Paragraph VII thereof.

VIII.

Defendants state that they are without knowledge as to any allegation contained in Paragraph VIII thereof.

IX.

Defendants deny that they have ever wrongfully or without right claimed that plaintiff has no water right on Mud Creek independent of the Flathead Indian Irrigation Project. Defendants state that they are without knowledge of any other allegation contained in Paragraph IX thereof.

X.

Defendants state that they are without knowledge of the value of the water mentioned in the amended bill of complaint in equity herein. [116]

XI.

Defendants deny that this action in equity is necessary to prevent a multiplicity of suits.

XII.

Defendants deny that plaintiff has no plain, speedy or adequate remedy at law.

XIII.

Defendants state that they are without knowledge as to any allegation contained in Paragraph XIII thereof.

XIV.

Defendants admit the allegations contained in Paragraph XIV thereof.

XV.

Defendants admit that they have some interest in the waters flowing in Mud Creek independent of the Flathead Indian Irrigation Project. Defendants allege, however, that whatever rights they have to the use of the waters of Mud Creek and its tributaries are subservient to the rights of the United States of America, defendant herein, and whatever rights they have were granted them by the United States of America pursuant to Federal Statutes.

XVI.

Defendants deny each and every allegation contained therein which is not hereinbefore specifically admitted, qualified or denied.

First Affirmative Defense.

For a further answer and by way of a first affirmative defense these answering defendants say:

That this action is not one for the partition of lands, but is in truth and in fact and in law an action to quiet title to the use of water. [117]

Second Affirmative Defense.

For a further and second affirmative defense, defendants say:

That the facts stated in the amended complaint in equity herein are insufficient to constitute a valid cause of action in equity as against these answering defendants.

Third Affirmative Defense.

For a further and third affirmative defense, defendants say:

That said court has no jurisdiction of the subject of this action to establish by decree an independent, individual water right for irrigation and domestic purposes to waters flowing on said Flathead Indian Reservation as against the rights of the United States of America to said waters and the administration and apportionment thereof.

Fourth Affirmative Defense.

For a further and fourth affirmative defense, defendants say:

That by a treaty between the United States and the Confederated tribes of Flathead, Kootenai and Upper Pend d'Oreilles Indians made July 16, 1855 (12 Stat. 975) ratified March 8, 1859 and proclaimed April 15, 1859, the Confederated tribes ceded, released and conveyed to the United States all their right, title and interest in and to a large portion of the country then occupied or claimed by them being in what is now the northwestern part of the State of Montana; and the United States set aside and there reserved for the exclusive use, benefit and occupancy of the said Confederated tribes and as a general Indian Reservation, upon which might be placed other friendly tribes and bands of Indians, a part of the lands so ceded and relinquished, which part so set aside and reserved as an Indian reservation is designated and known as the Flathead Indian Reservation. The purpose [118] and effect of this treaty was, in keeping with the general Indian policy of the United States, to enable these Indians to abandon their habits as a nomadic and uncivilized people and to become a self-supporting agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty. The lands of said reservation are arid and without artificial irrigation are valueless for farming and the growing of agricultural crops

thereon; and said reservation was and is too small in area to enable these Indians to support themselves as a nomadic and uncivilized people as they had theretofore lived and supported themselves upon the much larger area occupied and claimed by them. Upon the making of said treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian reservation and began and have continued to support themselves by farming and the growing of agricultural crops upon the lands of said reservation by means of artificial irrigation with the waters flowing upon said reservation. By the establishment of this reservation the United States, as sole owner of the lands and waters thereon, reserved for irrigation and other beneficial uses upon the lands of said reservation and exempted all of the waters upon said reservation including all of the waters of Mud Creek, which has its source and flows wholly within the boundaries of said reservation.

That pursuant to the Act of Congress of April 23, 1904 (33 Stat. L. 305), June 21, 1906 (34 Stat. L. 354), and April 30, 1908 (35 Stat. L., 70, 83), the United States commenced the construction of the Flathead Indian Irrigation Project to irrigate the irrigable lands on the Flathead Indian Irrigation Reservation in Montana most susceptible of and best adapted to irrigation and farming. That by virtue of the Act of Congress of April 30, 1908, the sum of $50,000 was appropriated from public monies for preliminary surveys, plans and estimates of irrigating [119] sys-

tems to irrigate the lands allotted by the Act of Congress of April 23, 1904, and the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of said irrigation project system.

That in succeeding years, by subsequent Acts of Congress, further amounts were appropriated for the construction, operation and maintenance of the irrigation system thus commenced; that up to June 30, 1936, the United States had expended the sum of $7,499,105.85 for the construction of the Flathead Indian Irrigation Project in Montana; and that the United States now owns, operates and is in control of the Flathead Indian Irrigation Project.

That pursuant to Section VII of the General Allotment Act of Congress of February 8, 1887 (24 Stat. L., 388), and in pursuance to other and subsequent Acts of Congress, the Secretary of the Interior, as the Agent of the United States, designated the lands on the Flathead Indian Reservation which were to receive water deliveries from the Flathead Indian Irrigation Project system. That all of said lands are classified as irrigable lands, subject to their pro rata share of the waters distributed by said Flathead Indian Irrigation Project system. That a portion of the lands of the defendant described herein have been classified as irrigable by the Secretary of the Interior and lie under said irrigation system and are subject to water deliveries therefrom.

That all of the waters of streams bordering upon and flowing through the Flathead Indian Reserva-

tion, including the waters of Mud Creek, are used by the Flathead Indian Irrigation Project system and are necessary for the proper irrigation of lands lying thereunder, designated as irrigable by the Secretary of the Interior and subject to water deliveries therefrom.

That the only right plaintiff, or her predecessors [120] in interest, ever had to use said waters or any part thereof, was and is the right to use for irrigation and other beneficial purposes, the amount of said waters apportioned and distributed to them, or to her, under the laws of the United States and the rules and regulations of the Secretary of the Interior of the United States Government, subject to lawful charges for operation, maintenance and construction of said project thereunder; and that neither the said water, nor any part thereof, on said Indian Reservation, was or could be appropriated, or title thereto acquired by plaintiff, or by her alleged predecessors, or by any person.

That pursuant to the Acts of Congress of June 21, 1906 (34 Stat. 354), and May 29, 1908 (35 Stat. 448), the United States, through its designated agent, the Secretary of the Interior, recognized all early water right developments of Indians and white settlers on the Flathead Indian Reservation in Montana which had been made prior to the year 1909.

That a committee appointed by the Secretary of the Interior made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian

Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909.

That on December 10, 1919, this committee reported to the Secretary of the Interior in regard to early developments of water rights on Mud Creek and other streams within the boundaries of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior issued pursuant to law. That the report of said committee and its recommendations were approved by said Secretary on November 25, 1921.

That pursuant to the aforesaid Acts of Congress [121] of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted the following valid and subsisting water rights from Mud Creek and its tributaries to the lands of the following defendants:

Name	Allotment No.	Land Description	Water Right
Alex Pablo	1152	N½NW¼ Sec. 14, T. 21 N., R. 20 W.	1000 gallons per day for domestic and stock uses.
Alphonse Clairmont	942	W½NW¼ Sec. 8, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 65 acres.
Alice Clairmont	944	SW¼NE¼ and SE¼NW¼ Sec. 18, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 19.6 acres.
Victor Clairmont	945	NW¼NE¼ & NE¼NW¼ Sec. 18, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 33.3 acres.
Henry Clairmont	946	SE¼NE¼ Sec. 7; SW¼SW¼ Sec. 5, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 13.8 acres.
Florence Clairmont	948	W½SE¼ Sec. 7, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 13.7 acres.
Lillian Clairmont	971	SE¼NW¼ & SW¼NE¼ Sec. 8, T. 21 N., R. 19 W.	2 acre feet per acre per annum on 60 acres.
Rose Ashley	1076	N½NE¼ Sec. 32, T. 22 N., R. 19 W.	1000 gallons per day for domestic and stock purposes.
Henry Ashley	1029	SE½SE¼ Sec. 29, T. 22 N., R. 19 W.	1000 gallons per day for domestic and stock purposes.
Alexander Sloane	1186	NE¼SW¼, W¾NW¼SE¼ & E¼NW¼SW¼ Sec. 34, T. 21 N., R. 20 W.	None.
Hattie Rose Sloane	1182	NE¼NW¼, W¼NE¼NW¼ & E¼NW¼NW¼ Sec. 34, T. 21 N., R. 20 W.	None.

That pursuant to said Acts of Congress, the Secretary of the Interior, on November 25, 1921, further declared that no other water rights of any kind were appurtenant to the above listed allotments. [122]

That save and except the rights these defendants acquired by the aforesaid grants of the Secretary of the Interior, acting in pursuance to Federal Statutes, these defendants admit they have no other rights except in some cases where water deliveries are or may be made to their lands by the Flathead Indian Irrigation Project system.

Fifth Affirmative Defense.

For a further and fifth affirmative defense, defendants say:

That all of the waters of Mud Creek and its tributaries are now and have been continuously since 1910 applied to beneficial use upon the lands of these defendants and upon other lands located on the Flathead Indian Reservation in Montana, subject to water deliveries from the Flathead Indian Irrigation Project system.

Defendants further allege that the lands of this plaintiff are included within the Flathead Irrigation District and are subject to the terms of a repayment contract and First, Second and Third supplemental contracts entered into between the Flathead Irrigation District and the United States of America; that on August 26, 1926, an order was duly given, made and entered of record in the District

Court of the Fourth Judicial District of the State of Montana in and for the Counties of Lake and Sanders in a proceeding entitled "In the Matter of the Formation of the Flathead Irrigation District" including the following described portion of the lands claimed by plaintiff herein in the Flathead Irrigation District, to-wit:

> West Half (W½) of Northeast Quarter (NE¼) of Section 14, in Township 21 North of Range 20 West, of the Montana Principal Meridian, in Lake County, Montana.

Wherefore these answering defendants pray that plaintiff's amended complaint in equity herein be dismissed and [123] that these answering defendants do have and recover of and from said plaintiff their costs and disbursements herein necessarily expended.

ROY F. ALLEN
Asst. United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of the Interior, United States Indian Irrigation Service. [124]

United States of America,
District of Montana,
County of Silver Bow—ss.

Roy F. Allen being duly sworn on behalf of the defendants in the above entitled action, says that he has read the foregoing answer and knows the

contents thereof and that the same is true to the best of his knowledge, information and belief; that the said defendants are absent from the County of Silver Bow, where their attorney has his office, and that the affiant is one of the defendants' attorneys and therefore makes this affidavit.

ROY F. ALLEN.

Subscribed and sworn to before me this 19th day of November, 1936.

[Seal] HAROLD L. ALLEN,
Deputy Clerk U. S. District
Court, District of Montana.

Due and legal service of the within Answer and receipt of a true copy thereof is hereby acknowledged this 23rd day of November, 1936.

ELMER E. HERSHEY,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 23, 1936. [125]

Thereafter, on November 23, 1936, Answer of Flathead Irrigation District to Amended Bill of Complaint, was duly filed herein, being in the words and figures following, to-wit: [126]

[Title of District Court and Cause.]

ANSWER OF FLATHEAD IRRIGATION DISTRICT.

Comes now the defendant, Flathead Irrigation District, and for answer to the plaintiff's amended complaint:

I.

Admits that on July 16, 1855 a treaty was entered into between the United States of America and the tribes of Indians referred to in Paragraph I of said amended complaint. Admits the lands of said reservation are arid and require water for irrigation. Denies that one inch of water per acre is necessary for the proper irrigation of said lands, and admits that pursuant to said treaty [127] said Indians settled upon and occupied said Indian reservation; but denies that said Indians farmed said lands by means of irrigation, otherwise than as hereinafter alleged in this answer, pursuant to the establishment of the Flathead Irrigation Project, hereinafter mentioned. In this connection this defendant alleges that a copy of said treaty is attached hereto, marked "Exhibit A," and expressly made a part of this answer.

II.

This defendant alleges that it is without knowledge as to whether Michel Pablo or Lizette Barnaby or either of them made allotment for or acquired any interest in the lands described in Paragraph II of said amended complaint, or any part of said lands.

III.

This defendant denies that on or about the 15th day of April, 1900, or at any other time, Michel Pablo, or any other person, constructed an irrigation ditch from Mud Creek, referred to in said amended complaint, and denies that Michel Pablo, or any other person, or any Indian allottee, on April

15, 1900, or at any other time, appropriated or became the appropriator or appropriators of any of the waters of Mud Creek, and specifically denies that any of said waters thereby or otherwise or at all became appurtenant to any of the lands described in said amended complaint. In this connection this defendant alleges the fact to be that none of the lands of said Indian Reservation and none of the lands described in the amended complaint were allotted in severalty or ceased to be tribal Indian lands prior to the year 1910, and defendant alleges the fact to be that all of said lands remained unallotted tribal Indian lands, without ownership in severalty, until the year 1910.

IV.

Admits that on the dates mentioned in Paragraph IV of said amended complaint fee patents were issued to Agatha Pablo for [128] certain of the lands described in the amended complaint, and admits that plaintiff is now the owner in fee of the lands described in the complaint, but specifically denies that the plaintiff is the owner of any water right or of any of the waters of Mud Creek, and specifically denies that there was then or ever or at all, any of the waters of Mud Creek appurtenant to said lands.

V.

Admits that on June 21, 1906, Congress made the enactment referred to in Paragraph V of the amended complaint, but denies that at the times mentioned in said paragraph, or at any other time

prior to the commencement of this action, any ditch or ditches was or were used for the conducting of water from Mud Creek to the lands described in the amended complaint, or any of them.

VI.

Admits that the United States claims an interest in the waters of said Mud Creek, but denies that the United States has deprived the plaintiff of any use of said waters to which plaintiff is entitled, and denies that the plaintiff has any right, title or interest in or to said waters of Mud Creek, or any of them.

VII.

Denies that the plaintiff and the United States are tenants in common, or joint tenants, in the use of the waters of Mud Creek, and denies that the plaintiff has any interest whatsoever therein.

VIII.

Admits that Harold L. Ickes is Secretary of the Interior, and is in charge of the Flathead Indian Irrigation Project, and admits that Henry Gerharz is the Project Manager of said project. [129]

IX.

Admits that the defendants last named are claiming that the plaintiff has no water rights on Mud Creek, independent of said Indian Irrigation Project.

X.

Admits that the interest in controversy in this action, exclusive of interest and costs, exceeds the sum of Three Thousand ($3000.00) Dollars.

XI.

Admits that the defendants Alex Pablo and A. M. Sterling are each claiming rights in the waters of Mud Creek.

XII.

Admits that this defendant is a public corporation duly incorporated under the laws of the State of Montana.

XIII.

Defendant alleges that it is without knowledge as to whether the other defendants named in said amended complaint, but not heretofore specifically mentioned, claim some interest in or to the said waters of Mud Creek.

Further answering said amended complaint this defendant alleges that heretofore and on the 26 day of August, 1926, this defendant was, by an order and decree of the District Court of the Fourth Judicial District of the State of Montana in and for the County of Lake, which was duly given, made and entered on said date, duly created and established as an irrigation district, under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts for the purpose of cooperating with the United States in the construction of irrigation works and projects, and this district was duly organized and created pur-

suant to the Acts of Congress of May 10, 1926 (44 Stat., 464-466), January 12, 1927 [130] (44 Stat., 945), March 7, 1928 (45 Stat., 212-213), March 4, 1929 (45 Stat., 1574), March 4, 1929 (45 Stat., 1639-1640), and May 14, 1930 (46 Stat., 291), and other Acts amendatory thereof and supplemental thereto. That all of the lands within this defendant district are lands within said Flathead Indian Reservation, and were and are lands within the Flathead Indian Irrigation Project, mentioned in the said amended complaint. That subsequently and on or about the 12 day of May, 1928, this defendant district entered into a certain repayment contract between said district and the United States of America, which said repayment contract contained terms and provisions required to be incorporated therein by the aforesaid Acts of Congress, and subsequently and on the 12 day of July, 1926, said repayment contract was, by a judgment and decree of the District Court of the Fourth Judicial District of the State of Montana in and for the County of Lake, duly given, made and entered on said date, duly confirmed, approved and ratified, and all proceedings in relation thereto duly confirmed, which decree became final, and that ever since the date aforesaid the said repayment contract has been in full force and effect, and this defendant has been under the obligations, and is now under the obligations created thereby.

That under and by virtue of the treaty with the Indian tribes, copy of which is attached hereto marked "Exhibit A," all of the waters upon said

Flathead Indian Reservation, including the waters of said Mud Creek, were reserved by the United States, and exempted from appropriation under state laws or any other laws, and reserved for the use and benefit of said Indian tribes. That thereafter and immediately upon the enactment of the Act of Congress of April 23, 1904 (33 Stat., 302-306), the United States, and the Secretary of the Interior, pursuant to the authorities contained in said Act, established, set up [131] and created, for the benefit of said Indian tribes, the Flathead Irrigation Project, for the irrigation of lands thereafter to be allotted under said Act to individual Indians, and for the irrigation of the surplus unallotted lands mentioned in said Act, and that thereafter the United States has, without interruption, continued the construction of said Flathead Indian Irrigation Project and is still continuing the construction thereof, all of which has been done pursuant to the said Act of April 23, 1904, and Acts amendatory thereof and supplemental thereto; and this defendant alleges that by the initiation and establishment of the said Irrigation Project the United States appropriated and segregated all of the waters lying upon said Indian Reservation and which might in any manner be utilized in conjunction with the construction of said Indian Irrigation Project, for the use and benefit of said Indian tribes, through the irrigation of the said allotted and surplus unallotted lands. That said Project was thus established and commenced prior to the date of any allotments in severalty of lands upon said reserva-

tion, and prior to the sale or disposition of any surplus unallotted lands, and that the lands within this defendant district are composed in part of allotted lands and in part of surplus unallotted lands which were sold pursuant to the aforesaid Acts of Congress, and that the owners of said lands within said irrigation district, by virtue of their right to receive water under said project, are, together with this defendant district, the successors in interest and title of the said Indian tribes, in and to the waters of said reservation, including all of the waters of said Mud Creek; that any attempted diversion or appropriation of the waters of Mud Creek for the purpose of acquiring a private water right therein, would be in violation of the said Acts of Congress, and in derogation of the rights established thereby and by the creation of said Indian Irrigation Project, and [132] wholly void, illegal and of no effect.

That the lands within this district are arid and require irrigation for the successful cultivation thereof, and that the sources of supply for said irrigation project and for said lands which are served thereby, are insufficient to supply all of the needs and requirements of the lands within said district, even although all of the waters of Mud Creek be taken, used and diverted into the irrigation system of said irrigation project, and if the plaintiff is permitted to take or use any of the waters of Mud Creek for irrigation or other purposes, the lands within this defendant district will be deprived of a portion of the waters required and needed by them

and to which they are entitled under the said irrigation project and under the contract between this defendant and the United States.

That under and pursuant to its contract with the United States this defendant has levied taxes and assessments upon private lands and has assumed obligations to the United States for the payment of construction charges and other charges against said land in an amount in excess of Five Million Dollars, and that if this plaintiff be permitted to divert said waters the lands of said district will suffer material detriment in loss of needed waters, and be unable to make payment of the assessments so levied and required for the payment of said obligations to the United States.

Wherefore, this defendant prays that plaintiff take nothing by her said action, and that the same be dismissed upon the merits.

WALTER L. POPE
RUSSELL E. SMITH
Solicitors for Flathead
Irrigation District [133]

"EXHIBIT A"

TREATY WITH THE FLATHEADS, ETC., 1855

Articles of Agreement and Convention Made and Concluded at the Treaty-Ground at Hell Gate, in the Bitter Root Valley, This Sixteenth Day of July, in the Year One Thousand Eight Hundred and

Fifty-Five, by and Between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington, on the Part of the United States, and the Undersigned Chiefs, Head-Men, and Delegates of the Confederated Tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on Behalf of and Acting For Said Confederated Tribes, and Being Duly Authorized Thereto by Them. It Being Understood and Agreed That the Said Confederated Tribes Do Hereby Constitute a Nation, Under the Name of the Flathead Nation, with Victor, the Head Chief of the Flathead Tribe, as the Head Chief of the Said Nation, and That the Several Chiefs, Head-Men, and Delegates, Whose Names Are Signed to This Treaty, Do Hereby in Behalf of their Respective Tribes, Recognize Victor as Said Head Chief.

Article 1. The said confederated tribe of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork, thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene Riv-

ers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head-waters of the Koos-koos-kee River and of the southwestern form of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

Article 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to-wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse Prairies: thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the

divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along [134] said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner and claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improve-

ments of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

Article 3. And provided, That if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Article 4. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, break-

ing up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years four thousand dollars each year; and for the next five years, three thousand dollars each year.

All of which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the *wises* of the Indians in relation thereto. [135]

Article 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the instruction of the Indians in trades,

and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide the necessary furniture the buildings required for the accommodation of said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the same houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed

by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Article 6. The President may from time to time, at his discretion, cause the whole or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 7. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

Article 8. The aforesaid confederated tribes of Indians acknowledge their dependence upon the Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. Nor will they make war [136] on any other tribe except in self-defense, but will submit all matters of difference

between them and other Indians to the Government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Article 10. The United States further agrees to guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading-post on the Pru-in River by the servants of that company.

Article 11. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo Fork, shall be carefully surveyed and examined, and if it shall

prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo Fork, shall be opened to settlement until such examination is had and the decision of the President made known.

Article 12. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens [L.S.]
Governor and Superintendent Indian Affairs W. T.
Big Canoe, his x mark [L.S.]
Kootel Chah, his x mark [L.S.]
Paul, his x mark [L.S.]
Michelle, his x mark [L.S.]
Nattiste, his x mark [L.S.]
Kootenays

Gun Flint, his x mark [L.S.]
Little Michelle, his x mark [L.S.]
Paul See, his x mark [L.S.]
Moses, his x mark [L.S.]
Henry R. Crosire
Gustavus Sohon,
Flathead Interpreter
A. J. Hoecken,
sp. mis.
William Craig
Victor, head chief of the Flathead Nation, his x mark [L.S.]
Alexander, chief of the Upper Pend d'Oreilles, his x mark [L.S.]
Michelles, chief of the Kootenays, his x mark [L.S.]
Ambrose, his x mark [L.S.]
Pah-soh, his x mark [L.S.]
Bear Track, his x mark [L.S.]
Adolphe, his x mark [L.S.]
Thunder, his x mark [L.S.]
James Doty,
secretary
R. H. Lansdale,
Indian Agent
W. H. Tappan,
sub Indian Agent

[Endorsed]: Filed Nov. 23, 1936. [137]

Thereafter, on November 23, 1936, Answer of A. M. Sterling and Alex Pablo to Amended Bill of Complaint was duly filed herein, being in the words and figures following, to-wit: [138]

[Title of District Court and Cause.]

ANSWER

Comes now A. M. Sterling and Alex Pablo, two of the above named defendants, and for answer to the amended bill of complaint in equity herein allege:

I.

Defendants admit the allegations contained in paragraph one of plaintiff's amended bill of complaint, save and except the allegation that one inch of water is necessary for the proper irrigation of said land. As to this allegation, the defendants, state that they are without knowledge. [139]

II.

Defendants admit that Michel Pablo and Lizette Barnaby are Flathead Indians of the Flathead tribe or nation of Indians and that the United States designated the allotments described therein to said Indians.

III.

Defendants admit that on or about the 15th day of April, 1900, said Indian allottee, Michel Pablo, was in the possession of, and the owner of the following described land, situated in the County of Lake, State of Montana, to-wit:

The West half (W½) of the Northeast quarter (NE¼) of Section Fourteen (14) in Town-

ship Twenty-one 21) North, of Range Twenty 20) West, Montana Principal Meridian, Montana.

and that he dug and constructed an irrigation ditch on Mud Creek, in Lake County, Montana, carrying eighty inches or two cubic feet of water per second of the waters from the said creek to his allotment above described for the purpose of irrigating his land above described; that said ditch was taken out on the right bank of Mud Creek, about the quarter corner common to Sections Twelve, Thirteen, Township Twenty-one (21) North, Range Twenty (20) West, long prior to the survey thereof, and while the same was unoccupied and unclaimed; and that said ditch was of sufficient size to carry said water; and that the said Michel Pablo thereby became the appropriator of eighty inches of water for the above described land from the waters of Mud Creek on or about the 15th day of April, 1900, and that the same has become appurtenant to said land, and at no time since the appropriation thereof has the same been abandoned. Further answering said paragraph three, the defendants deny each and every allegation not hereinbefore admitted.

IV.

Answering paragraph four the defendants state that they are without knowledge of any allegation contained in said paragraph four of said complaint. [140]

V.

Defendants admit the enactment into Laws of the United States the provisions of Section nineteen of the act of Congress of June 21, 1906 (34 Stat. L. P. 354), and that Michel Pablo was in the possession of the land hereinabove described; and admits all of the other allegations in said paragraph four except that said water was used by Michel Pablo for domestic use in irrigation upon the land hereinbefore described of which he was in possession and of which he was the owner, but deny that the water was used for domestic purposes or to irrigate the land of Lizette Barnaby as alleged and described in the plaintiff's complaint.

VI.

Answering paragraph six of said amended complaint, defendant admits that the United States of America claims some right and interest in the water flowing in Mud Creek, but as to all the other allegations contained in said paragraph six of plaintiff's complaint the defendant allege that they have not sufficient knowledge or information to form a belief and therefore deny the same.

VII.

Answering paragraph seven of said complaint, defendants deny that there are no other parties using the water of Mud Creek except the plaintiff and the United States of America, and in this connection allege that there are numerous users of the water of Mud Creek whose lands are situated both

above and below and adjacent to the lands described in the amended complaint in equity herein whose rights will be injuriously affected by any change in the amount or duty of water and whose presence as parties plaintiff or defendant in this action is necessary to a complete determination of this cause, except as hereinabove specifically specified, denied, or qualified states that the said defendants are without knowledge as to any allegation contained in said paragraph seven thereof. [141]

VIII.

Defendants admit paragraph eight of said amended bill of complaint in equity.

IX.

Answering paragraph nine of said amended complaint, defendants allege that they have not sufficient knowledge or information to form a belief as to the matters and statements therein stated, and therefore deny same.

X.

Defendants admit paragraphs ten, eleven, twelve, thirteen, fourteen, and fifteen.

Further answering said complaint, and by way of cross complaint herein the defendants allege:

I.

That on July 16, 1855, a Treaty was entered into between the United States of America and the Flathead, Kootenai and upper Pend d'Oreilles Indians as a Confederated Tribe to be known as the Flathead Nation, which Treaty was duly ratified March 8,

1859, and proclaimed by the President of the United States, April 18, 1859, (12 Stat. L. p. 975) by which Treaty what is known as the Flathead Indian Reservation was reserved exclusively for the use and occupation of said Confederated Tribes as a general Indian Reservation.

The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting, agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty.

The lands of said Reservation are arid and without artificial irrigation, and are valueless for farming and the growing of agricultural crops thereon. One inch of water per acre is necessary for the proper irrigation of said lands. [142]

Upon the making of said Treaty the said Confederated bands of Indians removed to and settled upon and have thereafter remained upon and occupied said Indian Reservation and began to farm and have continued to farm and to grow crops upon the lands of said Reservation by means of artificial irrigation with the waters flowing upon said Reservation.

II.

That Michel Pablo, a Fathead Indian of the Flathead tribe or nation of Indians, made an allotment for the West half of the Northeast quarter (W½ NE¼) of Section Fourteen (14) in Township Twenty-one North (21N) of Range Twenty (20) West, Montana Principal Meridian, Montana.

III.

That on or about the 15th day of April, 1900, said Indian allottee, Michel Pablo, who was then in possession of said described land, dug and constructed an irrigation ditch from Mud Creek in Lake County, Montana, carrying 560 inches of water from Mud Creek to his allotment and the allotments of his wife and children, for the purpose of irrigating said lands above described and for domestic purposes; that said ditch was taken out on the right bank of Mud Creek about the quarter corner common to Sections Twelve and Thirteen, Township Twenty-one (21) North, of Range Twenty (20) West, long prior to the survey thereof, and while the same was unoccupied and unclaimed land; that said ditch was of sufficient size to carry said water, and said Indian allottee thereby became the appropriator of 560 inches of the waters of Mud Creek on or about the 15th day of April, 1900, and the same has become appurtenant to his land hereinbefore described, and the lands of his wife and children, and at no time since the appropriation thereof has the same been abandoned. [143]

IV.

That the defendant, Alex Pablo, is the son of said Michel Pablo, and is the owner of the following described land, situated in the County of Lake, State of Montana, to-wit:

The North half (N½) of the Northwest quarter (NW¼) of Section Fourteen (14) in

Township Twenty-one (21) North, of Range Twenty (20), West, Montana Principal Meridian, Montana.

said land being his own personal allotment, the title to said land being held in trust for said defendant by the United States of America.

V.

That said Alex Pablo is a member of the Flathead tribe of Indians and a ward of the United States of America.

VI.

That the defendant A. M. Sterling is the owner of the legal title to the following described land, situated in the County of Lake, State of Montana, to-wit:

The South half (S½) of the Northwest quarter (NW¼) of Section Fourteen (14), in Township Twenty-one (21) North, of Range Twenty (20) West, Montana Principal Meridian, Montana.

said land formerly was owned by Agatha Pablo, the wife of Michel Pablo, deceased. Said land was, prior to the sale to the said defendant, allotted to said Agatha Pablo, and after receiving a patent in fee for said land, the said Agatha Pablo sold said land to the defendant A. M. Sterling.

VII.

That on or about the 14th day of November, 1907, Michel Pablo made and executed a Notice of Appro-

priation of 560 inches of the waters of Mud Creek, and the purpose for which said water was claimed and the place of intended use was for domestic and irrigation purposes for use upon the lands described in the said Notice of Appropriation hereto attached, marked "Exhibit A" and made a part of this answer as though set forth at length at [144] this place.

VIII.

That ever since the construction of the ditch from Mud Creek by Michel Pablo, and since the filing of his Notice of Appropriation with the Clerk and Recorder of Missoula County, Montana, the waters from said ditch have been continuously used up to the present time upon the land of the defendant Alex Pablo, and the land now owned by the defendant A. M. Sterling; that under said Notice of Appropriation there was appropriated for the defendant, Alex Pablo, for irrigation and domestic purposes, eighty inches of water, or two cubic feet of the waters of Mud Creek, for use upon his land, and under and by virtue of said appropriation, there was appropriated for use upon the lands of the defendant, A. M. Sterling, eighty inches or two cubic feet of the waters of Mud Creek; and that said ditch was constructed, and the waters appropriated and used by Michel Pablo and Alex Pablo and Agatha Pablo, and since the sale of the land to A. M. Sterling, by A. M. Sterling, his tenants and successors; and that the filing of the notice marked "Exhibit A" was made long prior to the acquiring of any rights whatsoever of the waters of Mud

Creek, by the United States of America or any other person or corporation whatsoever.

IX.

That on June 21, 1906, there was added by Congress of the United States, to the provisions of an act approved April 3, 1904, providing for the allotment of the lands on said Flathead Indian reservation and the opening of the same for sale and disposal Sections 17, 18, 19, and 20. Section 19 being as follows:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use of any ditches, dams flumes, reservoirs, constructed and used by them in the appropriation and use of said water." [145]

That from April 15, 1900 continuous up to and including June 21, 1906, and continuing thereafter to the present date, said ditch so dug and constructed, as aforesaid, was used and has been used upon the lands belonging to the defendants, Alex Pablo and A. M. Sterling, herein described in conveying the water from said Mud Creek to said land, and these defendants claim the benefit of said act of Congress in the use and possession of eighty inches or two cubic feet of water per second upon each of their respective tracts of land, from the waters carried in said ditch, and without any pref-

erence, and that the right to said water for irrigation and domestic purposes upon the respective land of these defendants. Their rights are superior and prior to the rights of any other person or persons or corporation, save and except the plaintiff, who, under the appropriation made by Michel Pablo is entitled to eighty inches of water or two cubic feet of water per second of the waters carried in said ditch, but that the plaintiff is not entitled to a prior right to the use of said water, but that her rights to the use of said water is equal with the rights of these defendants, without priority.

X.

That the United States of America, one of the defendants herein, claims an interest in the waters flowing in said Mud Creek, and has dammed up said creek and carries part of the waters away from these defendants, and has deprived said defendants of the full use of the water to which they are entitled; that the defendant, Alex Pablo, and the defendant, A. M. Sterling's right to the use of said water became vested in them or their predecessors long prior to the claim of the United States, and that the United States, under the provisions of said act of June 21, 1906, has no right to deprive these defendants of any water originally appropriated, and required by them and necessary for domestic use and irrigation of their lands, not exceeding, however, eighty inches of the waters flowing in said ditch from Mud Creek. [146]

XI.

That there are no other parties using the waters flowing in the ditch known as the Pablo ditch, from Mud Creek, except the defendants, Alex Pablo, and A. M. Sterling, and the plaintiff; and that the waters flowing in said ditch from Mud Creek can be divided, partitioned, and separated so that the amount of water that these defendants and the plaintiff are entitled to. can be fixed and determined, and also the rights of the United States as to the balance of the water flowing in said Mud Creek.

Wherefore: The defendants, A. M. Sterling and Alex Pablo, pray that the United States of America be required to set forth any interest the United States may have, if any, in the waters flowing in Mud Creek, Lake County, Montana, and that if any interest is claimed by the United States, to said water, the waters therein may be adjudicated between the United States and these defendants; and that the defendants right as herein set forth may be partitioned, separated, fixed, and established, and that said defendants, and each of them, be given a prior right to the use of said waters, of eighty inches or two cubic feet of water per second of the waters flowing in said ditch from Mud Creek; and that the defendants rights to the waters in said ditch be fixed and determined by the court, and that all other defendants named in this action be restrained from interfering with the rights of the defendants as so found; and that the defendants be given sufficient water for domestic use and for

the purpose of irrigation of their land, and for other beneficial use thereon, to the extent of eighty inches for each of the said defendants of the waters of Mud Creek and flowing through the irrigation ditch dug and constructed as herein set forth; and that these defendants have such other and further relief in the premises as may to the court seem meet and in accordance with equity and good conscience; and for costs of suit.

JOHN P. SWEE
Attorney for Plaintiff.
Ronan, Montana. [147]

State of Montana,
County of Lake—ss.

A. M. Sterling, being first duly sworn upon his oath deposes and says: That he is one of the defendants named in the above entitled action, that he has read the foregoing answer, knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated therein on information and belief and as to those matters he believes them to be true.

A. M. STERLING

Subscribed and sworn to before me this 23rd day of November, 1937.

[Seal] JOHN P. SWEE
Notary Public for the State of Montana
Residing at Ronan, Montana.

My Commission expires July 27, 1937.

EXHIBIT "A"

NOTICE OF APPROPRIATION

State of Montana,
County of Missoula,
Flathead Indian Reservation—ss.

To All Whom These Presents May Concern:

Be It Known, That Michel Pablo (No. 605) and his wife, Agate children, Joseph, Mary and Alex, and grand nieves, Mary and Philomene of Flathead Indian Reservation in said County and State do hereby publish and declare, as a legal notice to all the world, as follows, to-wit:

I. That they have a legal right to the use, possession and control of and claim Five Hundred and Sixty (560) inches of the waters of Mud Creek in said County and State for irrigating and other purposes.

II. That the purpose for which said water is claimed, and the place of intended use is for domestic and irrigation purposes on W/2 NW/4, SE/4 NW/4 and NE/ SW/4, Sec. 13, Twp. 21 N. R. 20 W. M. M.—W/2 NE/4, E½ SW/4 and NW/4 Sec. 14, Twp. 21 N. R. 20 W. M. M. and S/2 SW/4 Sec. 11 Twp. 21 N., R. 20 W., M. M.

III. That the means of diversion with size of flume, ditch pipe, or acqueduct, by which he intends to divert the said water is as follows: A ditch 48 inches by 18 inches in size, which carries and conducts 560 inches of water from said creek; which said ditch diverts the water from said stream at a point upon its North bank, and runs thence in a

westerly direction—The head of said ditch being about 150 yards above the land hereinbefore described, and being on land claimed by Marie Louise Pablo, thence over and upon said land (or mining claim).

IV. That they appropriated and took said water on the 15th day of April A. D. 1900, by means of said ditch. [148]

V. That the names of the appropriators of said water, Michel Pablo, Agate Pablo, Joseph Pablo, Mary Pablo, Alex Pablo, and Mary and Philomene Pablo.

VI. That they also hereby claim said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands, of any dams, flumes, reservoirs, constructed or to be constructed, by them in appropriating and in using said water.

VII. That they also claim the right to keep in repair and to enlarge said means of water appropriation at any time, and the right to dispose of the said right, water, ditch or said appurtenances in part or whole at any time.

Claiming the same all and singular, under any and all laws, National and State, and local rulings and decisions thereunder, in the matter of water rights.

Together with all and singular, the hereditaments and appurtenances thereunto belonging and appertaining, or to accure to the same.

Witness our hand at Ronan, Montana, this 12th day of November, 1907.

M. PABLO

Witness:
D. D. HULL

State of Montana,
County of Missoula—ss.

M. Pablo, having first been duly sworn, deposes and says that he is of lawful age and is one of the appropriators and claimants of the water and water right mentioned in the foregoing notice of appropriation and claim, and the persons whose name is subscribed thereto as the appropriator and claimant, that he knows the contents of said foregoing notice and that the matters and things therein stated are true.

M. PABLO

Subscribed and sworn to before me, this 14th day of November A. D. 1937.

[Seal] A. J. VIOLETTE
Notary Public in and for Missoula County, Montana.

Received for record Nov. 14th, 1907 at 2:10 p. m.
W. H. SMITH
County Recorder

Filed for record Nov. 14th A. D. 1907, at 2:10 o'clock p. m., and recorded in Book F of Water Rights, on page 277 Records of Missoula County, Montana.

W. H. SMITH
County Recorder

[Endorsed]: Answer filed Nov. 23, 1936. [149]

Thereafter, on December 9, 1936, Reply to Answer of United States was duly filed herein, being in the words and figures following, to-wit: [150]

[Title of District Court and Cause.]

REPLY TO ANSWER OF UNITED STATES OF AMERICA

Now comes Agnes McIntire, Plaintiff herein, and for her reply to the separate answer of The United States of America, filed herein, denies each and every allegation therein made, as set forth in its answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [151]

Thereafter, on December 9, 1936, Reply to Answer of Henry Gerharz was duly filed herein, being in the words and figures following, to-wit: [152]

[Title of District Court and Cause.]

REPLY TO ANSWER OF HENRY GERHARZ

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Henry Gerharz filed herein, denies each and every allegation therein made, as set forth in his answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that

he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [153]

Thereafter, on December 9, 1936, Reply to Answer of Flathead Irrigation District was duly filed herein, being in the words and figures following, to-wit: [154]

[Title of District Court and Cause.]

REPLY TO ANSWER OF FLATHEAD IRRIGATION DISTRICT

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Flathead Irrigation District filed herein, denies each and every allegation therein made, as set forth in its answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana,
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [155]

Thereafter, on December 9, 1936, Reply to Answer of Defts., members of the Flathead Tribe of Indians, was duly filed herein, being in the words and figures following, to-wit: [156]

[Title of District Court and Cause.]

REPLY TO ANSWER OF ALEX PABLO, ET AL.

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of Alex Pablo, Alphonse Clairmont, Alice Clairmont Cowan, Victor Leonard Clairmont, Henry Clairmont, Florence Clairmont, Ernest Clairmont, Grace Clairmont, Peter Oliver Dupuis, May Pablo, Alex Sloan,

George Sloane, Hattie Rose Sloan Hastings, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Rose Ashley, Henry Ashley, W. A. Dupuis, filed herein, denies each and every allegation therein made, as set forth in their answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, Plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [157]

Thereafter, on December 9, 1936, Reply to Answer of A. M. Sterling and Alex Pablo was duly filed

herein, being in the words and figures following, to-wit: [158]

[Title of District Court and Cause.]

REPLY TO ANSWER OF A. M. STERLING AND ALEX PABLO

Now comes Agnes McIntire, plaintiff herein, and for her reply to the separate answer of A. M. Sterling and Alex Pablo filed herein, denies each and every allegation therein made, as set forth in their answer as alleged therein, and the whole thereof, except as set forth and alleged in her complaint, filed herein.

Wherefore, plaintiff having fully replied to said answer asks for judgment and decree as prayed for in her complaint.

ELMER E. HERSHEY
Attorney for Plaintiff

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being duly sworn on behalf of the plaintiff in the above-entitled action, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ELMER E. HERSHEY

Subscribed and sworn to before me this 24th day of November, 1936.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires Oct. 21, 1938.

[Endorsed]: Filed Dec. 9, 1936. [159]

Thereafter, on September 15, 1937, the

DECISION OF THE COURT

was duly filed herein, being in the words and figures following, to-wit: [160]

[Title of District Court and Cause.]

The above entitled suit was instituted by the plaintiff for the purpose of establishing water rights to the use of the waters of Mud Creek on the Flathead Indian Reservation in Montana and to the extent of 160 inches thereof, with priority date as of April 15, 1900. An injunction is also sought against the United States of America, Harold L. Ickes, Secretary of Interior, and Henry Gerharz, project manager of the Flathead Reclamation Project, the defendants named in the complaint, for the purpose of restraining them from interfering in any manner with the alleged rights of plaintiff; and it is further provided therein that if the court should ultimately find the United States has any interest in said waters in connection with that claimed by plaintiff, that such waters be partitioned, separated, and established by decree of this court.

The material matters alleged are that the said reservation was established by treaty July 16, 1855, (Stat. L. 975) and also that the Indians of that locality were encouraged to abandon their habits of a nomadic people and become self-supporting. It is also alleged that the lands of the reservation are arid and without aid of irrigation are useless, and

that one inch of water per acre is necessary for said land. [161]

That Indian predecessors in interest on said date became the appropriators of 160 inches of the waters of Mud Creek, and that said waters have become appurtenant to the lands now owned by this plaintiff and that such water rights have never been abandoned and that continuous use of the water on the lands of plaintiff from the date of original appropriation down to the present time is also alleged. Plaintiff relies upon Section 19 of the act of June 21, 1906 (34 Stat. L. 354) as a basis of her claim to the right to the use of said waters and particularly the following provision of said Section:

> "Nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands, or for domestic use of any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water."

The bill also contains allegations to the effect that the United States claims an interest in the waters of Mud Creek and has in effect dammed up the waters and has thereby prevented plaintiff from using the same to the full extent of her alleged rights; she also claims that no other persons are using the waters of Mud Creek except plaintiff and the United States. Plaintiff prays that the waters

of said creek be divided, partitioned, and separated between plaintiff and the United States according to the provisions of Title 28 Section 41, subdivision 25 of the U. S. C. A. Plaintiff also alleges that the Secretary of Interior above named claims to be in charge of said irrigation project and that Henry Gerharz claims to be the project manager and in direct charge thereof, and "that they are made defendants herein in order that any rights, if any, adverse to the claim of the plaintiff may be established, fixed and determined." Plaintiff further alleges that the defendants are wrongfully and without [162] right denying her claim of right to the use of the waters of Mud Creek, independent of the Flathead Irrigation Project, and that defendants claim the right to deprive the plaintiff of the use of the waters of said creek and the right to withhold from flowing into and through the plaintiff's ditch any of the water thereof, and that she has no right whatever to the use of the waters thereof without paying the fees and charges prescribed by the aforesaid project.

On March 23, 1934, Judge George M. Bourquin, a judge of the above named court and then presiding in the above titled cause entered the following order: "Upon application of Elmer E. Hershey, attorney for plaintiff, and upon the records and files in said case.

> "It is ordered that said Harold L. Ickes, Secretary of Interior, defendant herein appear, plead, answer, or demur, by the 14th day of

April 1934, under the provisions of Section 57 of the Judicial Code of the United States (36 Stat. L. 1102) (Title 28 U. S. C. A. 118), and that a copy of this order together with a copy of the complaint be served upon said defendant forthwith dated this 23rd day of March 1934.

(Signed) BOURQUIN,
Judge."

On February 13, 1934, plaintiff caused to be mailed to the Secretary of Interior a copy of the bill of complaint which was received by him on February 17, 1934. On March 31, 1934 plaintiff caused to be served by the United States Marshal for the District of Columbia a copy of the bill of complaint and a copy of the order of the court of March 23, 1934 upon the Secretary of the Interior. It is claimed by the defendants this is the only attempt made by the plaintiff to serve process upon the defendant, Secretary of the Interior. The United States, was served with process under the provisions of Title 28, Section 41 subdivision 25, U. S. C. A. The original bill of complaint was filed subsequent to the decision of the Circuit Court of Appeals, 9th Circuit. [163] in the case of Moody v. Johnston, 66 Fed.(2) 999 and before the decision of the said court in the mandamus opinion in Moody, project manager v. Johnston, et al. and other cases, Nos. 6782, 6784, 6785, 70 Fed.(2) 835. The defendants claim that the facts relied upon in the present bill of complaint are identical with the basic facts of the original 9 amended bills of complaint considered by the above named court of appeals in its mandamus opinion. Defendants claim

that it is quite evident that this complaint was drafted with the intention of conforming to the pertinent language of the Court of Appeals in Moody v. Johnston, 66 Fed.(2) 999, 1003.

The first amended bill appears to be like the original except the matter relating to Pablo and Sterling and the appropriation of Michael Pablo claimed by the former for lands now owned by them. The motions of Pablo and Sterling to dismiss were denied. The appearances of the defendants, the United States and Henry Gerharz were allowed to stand as to the amended bill. The motion for judgment on the pleadings was denied May 5, 1936.

It appearing that all parties interested in Mud Creek had not been joined as parties defendant, plaintiff applied for permission to include others, which was granted, and about thirty-five new defendants were added. The second amended bill is like the first except in paragraphs XIV and XV. It is alleged that the defendants added claim some interest in the waters of Mud Creek, and that the Flathead Irrigation District is a corporation. In behalf of the United States and Henry Gerharz there were special appearances and objections to jurisdiction. The second or final amended complaint was never served upon Harold L. Ickes, Secretary of the Interior, no order was ever made by the court directing the Secretary of the Interior to appear by a day certain respecting the second amended complaint, and no appearance was made by the Secretary. Motions to dismiss were filed by defendants, Hendricks, Billie, and nineteen members of the

Flathead Tribe, also by the Flathead Irrigation District; answers were filed by the foregoing defendants on November [164] 23, 1936, and by A. M. Sterling and Alex Pablo. The separate answer of the District corporation was filed on November 24, 1936, to the cross complaint of defendants Sterling and Pablo.

The United States answered that it had not consented to be sued; that the suit was not one brought for the partition of lands, that it is in fact and legal effect one brought to determine the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek, and that the facts fail to state a cause of action in equity against the United States.

In his answer defendant Gerharz raises certain pertinent issues. He has no knowledge as to the date of construction of the ditch in paragraph III of plaintiff's amended complaint, or the size of the ditch or that the waters therein alleged to have been appropriated were appurtenant to the lands described therein; as to the issuance of patent in fee to plaintiff's Indian predecessors in interest, or as to the claim of continuous use of the waters aforesaid down to the present time. It is admitted that the United States claimed an interest in the waters of Mud Creek and that it dammed up such waters. It is denied that plaintiff's right to use these waters became vested prior to the claim of the United States, and that under the act of June 21, 1906, no right existed on the part of the United States to deprive plaintiff of the use of said waters. Defend-

ant claims that all of the acts here complained of were proper and lawful acts done pursuant to the orders, rules and regulations of the Secretary of the Interior and according to federal law, and that whatever rights plaintiff may have to the use of the waters of Mud Creek are subservient to the rights of the United States, and that such rights, if any, were granted by the United States under federal statutes.

Then follows a defense like that of the United States and the District Corporation. It is alleged in defense that the United States, [165] through the Secretary of the Interior recognized all early water right development of Indians and white settlers on the Flathead Indian Reservation prior to the year 1909, and granted a right to a portion of the lands to the extent of 1000 gallons of water per day for domestic and stock use, and that this particular right is the only one ever granted the Michael Pablo allotment by the United States. Again it is alleged that the United States had a quiet title by adverse possession to the waters claimed in plaintiff's second amended bill, and that "Since the date of giving further notice to all settlers along Mud Creek and its tributaries that the United States had appropriated all of the waters of this stream for beneficial use upon the lands of the Reservation, it had continuously and was now using all of said waters, and had done so for a period of more than ten years, adverse to the alleged rights of plaintiff."

Practically the same issues and defenses are raised by the nineteen members of the Flathead Tribe as

in the answer of defendant Gerharz. The defendants Sterling and Pablo claim rights to 560 miners' inches of the waters of Mud Creek with a date of priority as of April 15, 1900; they also rely upon a notice of appropriation pursuant to Montana law, and upon Section 19 of the Act of June 21, 1906, claiming thereunder that the United States recognized their irrigation development. It was ordered during the trial that all new matter raised in any of the answers would be deemed denied.

The record shows that the Secretary of the Interior made a special appearance denying the jurisdiction of the court and asking for dismissal of the suit. No answer was ever filed by him and no general appearance ever made by the Secretary of the Interior, although he was served with process and a copy of the original complaint. Thereafter the suit progressed and first and second amended complaints were filed; these amended complaints were not served upon the Secretary for obvious reasons. By his actions he had declined to enter the suit upon the claim asserted, based upon the statute referred to, that he could be [166] sued only in the District of Columbia.

The preliminary steps herein were taken by Judge Bourquin, before his retirement from the bench, and the law of the case established by him in his orders; he was a judge of co-ordinate jurisdiction with the present presiding Judge, acting in the same case and upon the same questions and record, and therefore the present presiding Judge will continue upon

the theory and orders adopted and entered by him, irrespective of his own views as *the* the questions presented and heretofore decided by Judge Bourquin. Having adopted the theory and law upon which Judge Bourquin rested the case, it now becomes important to ascertain whether the allegations of the complaint have been sustained by evidence that is clear and convincing.

It appears from the evidence in the case that on or about the 15th of April 1900, and for nine years prior thereto, Michael Pablo, an Indian allottee, was in possession of the land hereinbefore described, and dug an irrigation ditch from Mud Creek carrying 160 inches or four cubic feet of water per second of the waters of said creek to his allotment for irrigation purposes and said waters were used to irrigate his allotment; that such appropriation was made long prior to the survey thereof and while the lands were unoccupied and unclaimed. It appears from the evidence that the ditch was of sufficient size to carry the waters appropriated and that the said Michael Pablo thereby became the appropriator of 160 inches of Mud Creek on or about the date mentioned, and that the same has become appurtenant to the land above described and the appropriation thereof has not been abandoned.

It further appears from the proof that on January 25, 1918 a patent in fee was issued Agatha Pablo, wife of Michael Pablo, for the lands allotted to him and on October 5, 1918 a fee patent was issued to Agatha Pablo for said Lands allotted

Lizette Barnaby, and that afterwards said lands were sold and transferred to the plaintiff in this case and that plaintiff is now the owner in fee of said lands which [167] were thus allotted and patented to both of the said Indians, and that the waters so appropriated are appurtenant thereto.

The plaintiff herein places special emphasis upon the act of June 21, 1906, as well as upon the treaty entered into by the government both of which were heretofore referred to.

It appears that no other parties are using the waters of Mud Creek except this plaintiff, Alex Pablo, and A. M. Sterling, and the United States acting through the Flathead Reclamation Project, and that the four are tenants in common or joint tenants in the use of said waters. That it appears from the proof that the waters of Mud Creek can be divided, partitioned, and separated so that the amount of water this plaintiff has a right to use can be determined.

The defendants Alex Pablo and A. M. Sterling each claim that the appropriation of Michael Pablo as alleged in plaintiff's complaint was also made for additional lands now owned by them, and that they were made defendants in order that their rights might be determined. The other defendants mentioned in the complaint were named in order that they might have an opportunity to set forth any rights or interests, if any, claimed by them.

The patent for the lands embraced in the allotment of Michael Pablo and the patent for the lands

embraced in the allotment of Lizzie Barnaby, both of which were issued to Agatha Pablo, were received in evidence; one of these patents was for the west-half of the north-east quarter and the other for the east-half of the north-east quarter of section 14 township 21 north, range 21 west. Subsequent conveyances were introduced in evidence showing that plaintiff is the owner of the land described in her complaint. There seems to be no question so far as the proof is concerned that prior to 1891 a ditch was dug conveying water to these lands for irrigation purposes and for watering the stock for Michael Pablo. The water from this ditch was sufficient to cover all the 160 acres [168] now owned by the plaintiff.

The evidence further discloses that at an early day what was known as the Pablo ranch including the two eighties above mentioned was one of the best known places on the reservation and produced large crops of grain. Plaintiff asks for decree allowing her 160 inches of the waters of Mud Creek, and the evidence shows that this amount of water would be sufficient for irrigation of crops grown thereon; in other words, that one inch per acre would be sufficient.

Nothing in the act of June 21, 1910 should be construed to deprive any of said Indians of the use of the water appropriated and used by them for the necessary irrigation of their lands. It conclusively appears that the water right claimed by plaintiff was appurtenant to her lands. The leading

authorities to sustain the right of appropriation under the foregoing state of facts are to the effect that the government in its dealing with the Indians, may create property rights which once vested even it cannot alter. Morrow v. U. S. 243 Fed. 854, 856; Williams v. Johnson, 239 U. S. 414, 420; Sisemore v. Brady, 236, U. S. 441, 449; Choate v. Trapp, 224 U. S. 665; English v. Richardson, 224 U. S. 680; Jones v. Meehan, 175 U. S. 1; Chase v. U. S., 222 Fed. 593, 596; Sheer v. Moody, 48 Fed.(2) 327; Ickes v. Fox, et al. 57 Sup. ct. rep. 412; Winters v. U. S. 143 Fed. 740, 749; Skeen v. U. S. 273 Fed. 93, 95; U. S. v. Hibner, 27 Fed.(2) 909, 911.

A. M. Sterling and Alex Pablo, defendants, herein presented claims showing appropriations made of the waters of Mud Creek for the land described. It appears that A. M. Sterling is the owner of land situated in Lake County, in the state of Montana described as follows: the south-half of the north-west quarter of section 14 in township 21, north of range 20, west M. P. M. The proof shows that prior to 1891 Michael Pablo constructed a ditch conveying water from [169] Mud Creek to lands now owned by A. M. Sterling and Alex Pablo hereinbefore described and other lands, and that water had been used for irrigation purposes and for watering stock by Michael Pablo and also by Alex Pablo his successor, and by the tenants of A. M. Sterling. The defendants Alex Pablo and A. M. Sterling claim 80 inches of water from said ditch conveying water from Mud Creek to their

lands. From the evidence it appears that the ditch was constructed and a notice of appropriation was made prior to the opening of the Flathead Indian Reservation for settlement in 1910, and that the waters have been used continuously for the irrigation of lands and watering stock by Alex Pablo and A. M. Sterling down to the present time.

From the testimony of Alex Pablo it appears that he had irrigated on an average each year from fifteen to twenty acres of land, and also in respect to the land owned by A. M. Sterling the testimony was to the effect that twenty acres of his land had been irrigated and that the water had been used for domestic purposes and watering of live stock by his tenants; and that eighty inches of water would be necessary for the beneficial use of such lands. Both Pablo and Sterling claim the same rights under the act of June 21, 1906, as the plaintiff herein, and likewise rely upon the same authorities as are hereinbefore set forth.

From the law of the case and the evidence submitted in the opinion of the court these defendants are entitled to the use of eighty inches of water from the ditch constructed by Michael Pablo. Under the evidence there seems to be no question that the construction of the ditch and the appropriation of the water was made by Michael Pablo long prior to the time of appropriation by the United States, and therefore the rights of these defendants, his successors in interest, appear to be prior to any of the rights of the United States or any other person or

corporation, and that assertion will also hold true in respect to the plaintiff herein. [170]

To advert briefly to the testimony. The witness John Ashley, 76 years old, testified that he lived on the reservation all his life; knew Michael Pablo, who lived at foot of lake about eight miles from Pablo; all his lands were fenced; he raised wheat and oats and irrigated them from Mud Creek, through a ditch about a mile long, three feet wide on bottom and two feet deep; at the cut it was fifteen feet deep and extended 200 yards; the ditch had to be dammed on lower side in one place by use of logs extending about 150 yards; Michael Pablo used the water from the ditch on the Lizette Barnaby land, on that of Alex Pablo and Joe Pablo and on his ranch. When the water was turned in it filled the ditch "plumb full." Michael Pablo at one time had a large number of cattle; he raised hay and oats, witness had seen the latter six feet high; it was known as a "show place." Three eighties were irrigated and "that was Alex's and the old lady's and Joe's, and this other, the old man's, part of it right along side the fence."

Elmer E. Hershey, as a witness, said he drove by the ditch in 1891 and saw quite a large quantity of water flowing in it; ditch was in same place that it is today, and "road was fenced on both sides, and strung along the ditch, then on the east side and west side both, just as it is today, at the north-end of the Barnaby land and Michael Pablo land."

Jean McIntire in 1907, saw large crops growing on the land. Impossible to raise hay, grain, oats, or barley, or anything of that sort without irrigation.

Mr. Moody, the project engineer, told him he had no right to use of the water for irrigation, only to use for domestic purposes and watering stock.

The sheriff's deed was issued in 1924. They have used the water some every year since. The water was used on both the east and west eighties. They irrigated 40 acres of the east eighty which is a [171] meadow, and 20 acres on the west eighty. They cleaned out the ditch and took willows and brush out of it.

Bert Lish knew about irrigation—had been irrigating lands for fifty-three years. Knows the Pablo and Barnaby lands; he said that to do a good job of irrigating would require two inches to the acre, because the subsoil is gravel and rock; the top soil is black loam five or six or seven inches deep, and the balance rock and sand and gravel with no soil in it.

Mr. Stockton said one and one-half to two acre feet per acre, or one to two inches on the land, would be required for proper irrigation.

Alex Pablo, a defendant claims prior right to use of waters of Mud Creek. His allotment joins Michael Pablo land on the north-west. His eighty runs east and west and joins the north forty of the Michael Pablo land. He has lived there all his life; was born in 1889 and is a son of Michael Pablo. There was a ditch from Mud Creek running to his land and

Alex Pablo's, and water has flowed in that ditch ever since he was old enough to remember, and is still flowing in it. Michael Pablo used the water for stock purposes, domestic and some for irrigation; he was engaged in the stock business. He used the water on his own allotment and on Alex Pablo's allotment and on his wife's allotment for irrigation purposes. Michael Pablo irrigated twenty acres of Alex Pablo's allotment for hay and pasture land.

Michael Pablo flooded or irrigated about twenty-five acres of his wife's land now owned by the defendant, A. M. Sterling. He says water is necessary to raise crops and has been used most of the time. The ditch runs across his father's allotment now owned by the plaintiff. Alex testified that the irrigation of his land and his mother's had been almost continuous since he was old enough to do farming.

Thomas C. Moore has irrigated some of the land in question; he stated that he had not done much during the past two or three years as there was not enough water coming down, and he did not intend to make many repairs while the water question remained unsettled. [172]

The foregoing is the substance of the testimony of witnesses who resided on the lands in question or came in close contact with them. Certain affidavits and other proof have been submitted by defendants but in the court's opinion are not sufficient to cast discredit upon the claims of priority of right to the use of water from Mud Creek by the plaintiff,

Pablo and Sterling; and much of the proof is entirely irrelevant in view of the theory of the case adopted herein. The evidence shows that long prior to the commencement of the Flathead Irrigation Project the waters were appropriatd in the manner and to the extent herein above set forth. To quote the language of Judge Bourquin in Sheer v. Moody, 48 Fed.(2) 327-333: "It would seem that the ditches would carry more water, but the extent of the use is the measure of the right, when dilatory application has been interrupted by the government's intervening appropriation as here."

It seems possible that the Circuit Court of Appeals in Moody v. Johnston, 70 Fed.(2) 835, 840, may have meant, when it said: "We think the interests of the parties will best be litigated in a separate suit brought for that purpose", that the government ought to commence a suit against all of these defendants and all other interested parties and finally dispose of all material issues at one time; such a course would do away with most of the questions raised by government counsel in this and other suits of a like character which may remain pending for an indefinite period before the rights of the parties including the government are finally determined. It is apparent that the Secretary of the Interior is an indispensable party; counsel evidently believe that he can be sued only in the District of Columbia, and if that is the law governing in this suit then what has been done herein would seem to be of no avail and these important questions

no nearer settlement than they were in the beginning. Relief will be awarded as above indicated, and counsel will present findings of ultimate facts.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Sep. 15, 1937. [173]

Thereafter, on October 18, 1937, Petition for Rehearing by Flathead Irrigation District was duly filed herein, being in the words and figures following, to-wit: [174]

[Title of District Court and Cause.]

PETITION FOR REHEARING

Defendant Flathead Irrigation District, pursuant to Equity Rule 69, prays for a rehearing herein, and as special matter or cause for such rehearing says:

1. The court undertook to make no examination of the law here applicable upon the theory that "the law of the case" was established by Judge Bourquin. In so holding this court,

(a) Proceeds upon a misapprehension in that Judge Bourquin did not establish the law of this case; (Judge Bourquin retired May 31, 1934, and the motion to dismiss was not heard until November, 1936.)

(b) Makes a rule applicable to Indian reservation water rights utterly inconsistent and at variance with the rules heretofore established

by this court in the case of United States v. Powers et al, (Equity No. 2962—Billings Division) which latter decision is consistent with the theory of Judge Bourquin in Scheer v. Moody, 48 F.(2d) 327.

(c) Denies to this defendant its right to present to this court for consideration the points made by it in its briefs herein. Having been [175] necessarily made a party by amendment pursuant to the rule in Moody v. Johnston, 66 F.(2d) 999, defendant is by the court's ruling denied its day in court.

(d) Reaches not only a wrong result, but in addition lays down a precedent throwing into complete confusion the law applicable to thousands of acres of land in the Flathead area. Neither this defendant nor the persons with whom it deals can possibly know whether the rule of this case or the rule of United States v. Powers, or such rule as the Circuit Court of Appeals may establish on review thereof, will be applicable to all users on the Flathead reservation, (all because it is assumed that Judge Bourquin established the law of this case.)

2. The brief heretofore filed by this defendant (and which the court for the reasons stated in the opinion apparently has not considered) for the first time in the history of litigation concerning Flathead water rights, points out the history, reason and proper interpretation of Section 19 of the Act of June 21, 1906 (34 Stat. L. 354) upon which this

action is predicated. It demonstrates that whatever is a sound decision in United States v. Powers must necessarily be a sound decision in this case concerning the Flathead.

ARGUMENT

Even if action on a motion to dismiss, usually perfunctory, could be construed as a determination of the law of a case, yet here since Judge Bourquin retired May 31, 1934, and with but one exception has refrained from judicial action thereafter, it is obvious that since motions to dismiss were passed upon in November, 1936, Judge Bourquin did not determine the law of this case. [176]

Now, while defendant's position here is not that of the decision in U. S. v. Powers, it is obvious that the decision in that case was reached after long trial and argument and careful consideration. It presents a logical and reasonable theory, one of equality, fully consistent with Section 7 of the General Allotment Act (24 Stat. L. 388). It was there decreed that "each irrigable acre is entitled to the same amount of water as any other acre * * * whether such land is under a government ditch or not", all rights being dated 1868. In Moody v. Scheer, 48 Fed.(2d) 327, Judge Bourquin said nothing indicating any priority in private water rights. He said (p. 330, Col. 1)

> "In either case, any such right is limited to water *in equity with all other like users* and to the extent reasonably necessary." [Emphasis is by the Court.]

Here, most unfortunately, and to the confusion of all interested parties, it is found "the rights of these defendants (Pablo and Sterling) appear to be prior to any of the rights of the United States, or any other person or corporation, and that assertion will also hold true in respect to the plaintiff herein."

How can the rule relating to water rights on Indian reservations be different in the Missoula division from that in the Billings division? Section 19 of the Act of June 21, 1906 (34 Stat. L. 354), as pointed out in our original brief, and under the rule of Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 162, relating to such saving clauses, creates no new or different rule on the Flathead reservation. And it does seem hard on this defendant, representing as it does thousands of farmers, whose water is already short, to give it no chance to argue the law applicable.

It is respectfully submitted that this Court should determine for itself the law applicable in this case, and that if [177] the position taken by defendant in its brief and by us deemed unanswerable is not to be adopted that at least no rule more drastic than that stated in the Powers case should be applied here.

WALTER L. POPE
RUSSELL E. SMITH
Solicitors for defendant,
Flathead Irrigation District.

Service of the foregoing Petition for Rehearing acknowledged this 15th day of October, 1937.

ELMER E. HERSHEY
Attorney for Plaintiff.

I certify that I have mailed in the usual manner a copy of the foregoing Petition to each of the following named persons:

John P. Swee, Attorney for certain defendants, at Ronan, Montana.

John B. Tansil, United States District Attorney, Butte, Montana.

Kenneth R. L. Simmons, Indian Irrigation Attorney, Billings, Montana.

WALTER L. POPE.

[Endorsed]: Filed October 18, 1937. [178]

Thereafter, on October 22, 1937, Proposed Findings of Fact and Conclusions of Law by the United States, Henry Gerharz, and members of the Flathead Tribe of Indians, was duly filed herein, being in the words and figures following, to-wit: [179]

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF UNITED STATES OF AMERICA, HENRY GERHARZ, PROJECT MANAGER AND 19 MEMBERS OF THE FLATHEAD TRIBE OF INDIANS.

Comes Now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian

Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and nineteen defendants specifically designated by name in the answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and proposes the following findings of fact and conclusions of law in behalf of all of the foregoing defendants:— [180]

Findings of Fact

I

That this action is one brought to settle the relative priorities and rights of the parties thereto to the use of the waters of Mud Creek on the Flathead Indian Reservation in the State and District of Montana, and is not an action in partition which would fall under the provisions of Title 28, Section 41, Subdivision 25 U. S. C. A.

II

That the consent of the United States to be sued in this action has not been given.

III

That no valid and legal service of process in this action has ever been made upon Harold L. Ickes,

Secretary of the Interior, who is an indispensable party defendant.

IV

That by virtue of a treaty between the United States of America and the Confederated Tribes of Flathead, Kootenai, and Upper Pend d'Oreilles Indians made July 16, 1855 (12 Stat. L. 975), ratified March 8, 1859 by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859, the United States as sole owner of the lands and waters of the Flathead Indian Reservation, Montana, reserved for irrigation and other beneficial uses upon the lands of said reservation and exempted from appropriation under territorial or State law or otherwise all of the waters upon said reservation, including all of the waters of Mud Creek and its tributaries, which has its source and flows wholly within the boundaries of said reservation.

V

That pursuant to the Acts of Congress of April 23, 1904, (33 Stat. L. 305), June 21, 1906, (34 Stat. L. 354), and April 30, 1908, (35 Stat. L. 70 and 83); the United States commenced the construction of the Flathead Irrigation Project to irrigate the irri- [181] gable lands on the Flathead Indian Reservation in Montana most susceptible of and best adapted to irrigation and farming. That by virtue of the Act of Congress of April 30, 1908 the sum of $50,000 was appropriated from public moneys for preliminary surveys, plans and estimates of

irrigation systems to irrigate the lands allotted by the Act of Congress of April 23, 1904, as well as the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of said irrigation project system.

VI

That in succeeding years, by subsequent Acts of Congress, further amounts were appropriated for the construction, operation and maintenance of the irrigation system thus commenced; that up to June 30, 1936 the United States had expended the sum of $7,499,105.85 for the construction of the Flathead Irrigation Project in Montana; and that the United States owns, operates, and is in control of the Flathead Indian Irrigation Project.

VII

That pursuant to Section 7 of the General Allotment Act of Congress of February 8, 1887 (24 Stats. L. 388), and in pursuance to other and subsequent Acts of Congress, the Secretary of the Interior, as the designated agent of the United States, allocated the lands on the Flathead Indian Reservation which were to receive water deliveries from the Flathead Indian Irrigation Project.

VIII

That the only right plaintiff or her predecessors in interest have to the use of the waters of Mud Creek is the right to her pro rata share of the

waters apportioned and distributed through the Flathead Irrigation Project system under the laws of the United States and under the rules and regulations of the Secretary of the Interior and the right granted to a portion of her said lands by the Secretary of the Interior in pursuance to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, in the amount of 1,000 gallons of water per day from Mud Creek for domestic and stock uses.

[182]

IX

That all of the waters of Mud Creek and its tributaries are used by the Flathead Irrigation Project system and are necessary for the successful irrigation of lands lying thereunder, designated as irrigable by the Secretary of the Interior and subject to water deliveries therefrom.

X

That the only rights the nineteen members of the Flathead Tribe of Indians, defendants herein, have in and to the use of the waters of Mud Creek and its tributaries are rights granted them by the Secretary of the Interior in pursuance to the Acts of Congress aforesaid of February 8, 1887, June 21, 1906, and May 29, 1908.

XI

That the Secretary of the Interior in allocating the waters of the streams of the Flathead Indian Reservation, including the waters of Mud Creek

and its tributaries has acted strictly in pursuance to authority vested in him by all of the acts of Congress herein set out and under said acts of Congress has absolute control over the distribution of the waters of Mud Creek and its tributaries.

XII

That the United States has continuously and at all times since about the year 1855 and for a period greatly exceeding ten years prior to the filing of this action, asserted and exercised the actual, visible, open, notorious, and exclusive ownership, possession, and control of all of the waters of Mud Creek, under claim of title in the United States as aforesaid and hostile to the claims of all other persons whomsoever; that at all times during said period of more than ten years immediately preceding the filing of this action, plaintiff and her predecessors have been permitted by the United States to use only such waters as have been granted by the Secretary of the Interior to the lands of plaintiff limited to the amount of 1,000 gallons of water per day for domestic and stock use. [183]

Conclusions of Law

I

That this action is not one in which the United States of America has consented to be sued and is not an action brought for the partition of lands, and a decree of dismissal should issue in favor of the

United States in accordance with this prayer set forth in its answer on file herein.

II

That no valid and legal service of process has ever been made upon the Secretary of the Interior in this action and a decree of dismissal should issue as to him.

III

That the United States of America through the Secretary of the Interior has the right to completely control the use of the waters of streams flowing through or within the Flathead Indian Reservation in Montana.

IV

That the United States District Court for Montana has no jurisdiction over the Secretary of the Interior. He can only be sued in a district of which he is an inhabitant, not the District of Montana, but the District of Columbia.

V

That the Secretary of the Interior is an indispensable party defendant herein.

VI

That the plaintiff has failed to state a valid cause of action in equity against any of the defendants herein and all are entitled to decrees of dismissal in

accordance with the prayers contained in their respective answers.

.....

Judge.

Copies to:

E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff;
Pope & Smith, Missoula, Mont.
Attorneys for defendant;
Flathead Irrigation District;
John P. Swee, Ronan, Mont.
Attorney for defendants, Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Oct. 22, 1937. [184]

Thereafter, on October 27, 1937, the Plaintiff, Agnes McIntire, filed herein her objections to the proposed findings of the United States, et al., which objections are in the words and figures following, to-wit: [185]

[Title of District Court and Cause.]

OBJECTIONS TO THE FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE UNITED STATES OF AMERICA, HENRY GERHARZ, PROJECT MANAGER, AND 19 MEMBERS OF THE FLATHEAD TRIBE OF INDIANS.

Now comes the plaintiff, Agnes McIntire, and files and enters the following Objections and Exceptions

to the Proposed Findings of Fact and Conclusions of Law of the United States of America, Henry Gerharz, Project Manager and 19 members of the Flathead Tribe of Indians.

I.

Plaintiff objects and excepts to Paragraph I of Proposed Findings of Fact for the reason that it is not sustained by the complaint filed, or the evidence given, and particularly objects to that part of said paragraph stating that it is not an Action in Partition, that would [186] fall on the provisions of Title 28, Section 41, Sub-Division 25, U. S. C. A., for the reason that it is such an Action, so alleged in the complaint, and sustained by the evidence.

II.

Plaintiff objects and excepts to proposed Findings No. II and III for the reason that it is a misstatement of fact, as shown by written exceptions heretofore filed in this case, showing services upon both the United States, and on Harold L. Ickes, Secretary of the Interior.

III.

Plaintiff objects and excepts to Proposed Findings of Fact No. IV for the reason that it is a mere conclusion, and not sustained by the evidence given at the trial, or the treaty referred to.

IV.

Plaintiff objects and excepts to Proposed Finding No. V for the reason that under the provisions of

the Acts of Congress mentioned and described, and under the evidence given, this case, it was expressly provided that, "nothing in said Acts shall be construed to deprive any of said Indians * * * of the use of water appropriated and used by them for the necessary irrigation of their lands" and that said provision was binding upon all parties connected with the reclamation and irrigation of the lands on the Flathead Indian Reservation and the amount of money spent, or the conclusions reached as to what lands are best adapted to irrigation and farming would not warrant those in charge of said irrigation system of violating the plain and express will of Congress, and by so doing, deprive plaintiff of her property rights. [187]

V.

Plaintiff objects and excepts to paragraph VI for the same reason, and in addition objects to the statement, "and that United States owns, operates, and is in control of the Flathead Irrigation Project," for the reason that it is not a correct statement.

VI.

Plaintiff objects and excepts to Proposed Findings No. VII for the reason that no authority was given the Secretary of the Interior at any time to take away from plaintiff, and her predecessors in interest, her prior rights and if an injury threatened by the illegal action in depriving plaintiff of her property, the officer cannot claim immunity from injunction process as alleged in plaintiff's complaint, and sustained by the evidence offered.

VII.

Plaintiff objects and excepts to Finding No. VIII for the reason that it is not sustained by the pleading or the evidence given in this case.

VIII.

Plaintiff objects and excepts to Findings No. IX, X, and XI for the reason that the same are not sustained by the evidence and are not made an issue in this case.

IX.

Plaintiff objects and excepts to Finding No. XII for the reason that it is a mis-statement of the facts, and Congress, under the Act of April 25, 1904, (33rd Stat. L. p. 302) expressly disclaimed any interest in, or ownership of any portion of the lands except 16 and 36, or the equivalent in each Township, or to dispose of said lands, except as [188] provided in said Act, or to guarantee to find purchasers for said lands, or any portion thereof, it being expressly stated that it was the intention of the Act that the United States should act as Trustee, for said Indians, to dispose of said lands, and to expend and pay over the proceeds received from the sale thereof, only as received.

X.

Plaintiff objects and excepts to the Conclusions of Law Nos. I to VI, for the reason that such Conclusions are not warranted under the law applicable

to this case, and the evidence introduced at the trial thereof.

ELMER E. HERSHEY,
Attorney for Plaintiff.

Dated this 26th day of October, 1937.

Copies to:
Kenneth R. L. Simmons, Billings, Montana.
Pope & Smith, Missoula, Montana.
John P. Swee, Ronan, Montana.
John B. Tansil, United States Attorney, Butte, Montana.

[Endorsed]: Filed Oct. 27, 1937. [189]

Thereafter, on October 27, 1937, the Defendant, Flathead Irrigation District, filed its proposed findings of fact and conclusions of law, in the words and figures following, to-wit: [190]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant, Flathead Irrigation District, and proposes the following Findings of Fact and Conclusions of Law, and requests the Court to adopt the same as the Findings of Fact and Conclusions of Law of the Court.

Findings of Fact

I.

That heretofore and on the 26th day of August, 1926, the defendant, Flathead Irrigation District,

was, by an order and decree of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Lake, which was duly given, made and entered on said date, duly created and established as an irrigation district, under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts for the purpose of cooperating with the United States in the construction of irrigation works and projects. That all of the lands within the said defendant Flathead Irrigation district are lands within Flathead Indian Reservation, and the Flathead Indian Irrigation Project, mentioned in [191] the said amended complaint. That subsequently and on or about the 12th day of May, 1928, the said defendant district entered into a certain repayment contract between said defendant district and the United States of America, in the manner required by law, and that ever since the date aforesaid the said repayment contract has been in full force and effect, and the defendant Flathead Irrigation District has been under the obligations, and is now under the obligations created thereby.

II.

That the United States entered into a treaty with the Confederated Tribe of Flathead Kootenai and Upper Pend d-Oreille Indians, which said treaty was ratified March 8, 1859, by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859. That under and by virtue of said treaty, a copy of which

is attached to this defendant's answer herein, the United States reserved to itself as trustee for the Flathead tribe of Indians the lands within the said Flathead Indian Reservation, and all of the waters thereof, including the waters of Mud Creek. [192]

III.

That thereafter Congress enacted the Act of April 23, 1904 (33 Stat. 302-306), providing for the allotment of lands in severalty to members of the Flathead tribe of Indians, and for the sale of surplus unallotted lands mentioned in the said Act, and that thereafter and immediately upon the enactment of the Act of Congress of April 23, 1904 (33 Stat. 302-306), the United States, and the Secretary of the Interior, pursuant to the authorities contained in said Act, established, set up and created, for the benefit of said Indian tribes, the Flathead Irrigation Project, for the irrigation of lands thereafter to be allotted under said Act to individual Indians, and for the irrigation of the surplus unallotted lands mentioned in said Act, and that thereafter the United States has, without interruption, continued the construction of said Flathead Indian Irrigation Project and is still continuing the construction thereof, all of which has been done pursuant to the said Act of April 23, 1904, and Acts amendatory thereof and supplemental thereto; and that by the initiation and establishment of the said Irrigation Project the United States reserved and segregated unto itself as trustee all of the waters

lying upon said Indian Reservation and which might in any manner be utilized in conjunction with the construction of said Indian Irrigation Project, including the waters of Mud Creek for the use and benefit of said Indian tribes, through the irrigation of the said allotted and surplus unallotted lands.

IV.

That said Project was thus established and actual field operations commenced prior to the date of the allotment in severalty of any lands to the plaintiff herein or her predecessors in interest or to the defendants Pablo and Sterling or their predecssors in interest or any allotments in [193] severalty of lands upon said reservation, and prior to the sale or disposition of any surplus unallotted lands, and that the lands within this defendant district are composed in part of allotted lands and in part of surplus unallotted lands which were sold pursuant to the aforesaid Acts of Congress, and that the owners of said lands within said irrigation district, by virtue of their right to receive water under said project, are, together with this defendant district, the successors in interest and title of the said Indian tribes, in and to the waters of said reservation, including all of the waters of said Mud Creek.

V.

That the United States has never authorized the appropriation of water on the Flathead Indian Reservation by any individuals, and has never made the provisions or laws of the State of Montana

applicable to the lands and waters within the said Flathead Indian Reservation. That at the time the attempted appropriations by the plaintiff and by the defendants Pablo and Sterling were claimed to have been made, there was no law in existence authorizing the appropriations so claimed, and that said claimed appropriations were wholly void, invalid and of no effect.

VI.

That the United States has never authorized the Secretary of the Interior to adjudicate or decree private rights to any individuals on the Flathead Indian Reservation, and that any and all acts of the Secretary of the Interior purporting to decree or adjudicate any private appropriations of water on the Flathead Indian Reservation are wholly void, invalid and of no effect. [194]

Conclusions of Law

I.

That the plaintiff and the defendants, Pablo and Sterling have no rights to any of the waters flowing in Mud Creek, or any of its tributaries, or to any of the other waters on the Flathead Indian Reservation except such rights as they may have to receive water proportionately distributed through the Flathead Irrigation Project under the laws of the United States and under the rules and regulations of the Secretary of the Interior upon the payment of the proper charges therefor.

II.

That the plaintiff and the defendants, Pablo and Sterling, have failed to state a valid cause of action in equity against any of the remaining defendants, and that the plaintiff's cause of action should be dismissed upon the merits.

Let judgment be entered accordingly.

.....

Judge. [195]

Service of the foregoing Proposed Findings of Fact and Conclusions of Law of defendant, Flathead Irrigation District acknowledged this 27th day of October, 1937.

ELMER E. HERSHEY
Attorney for Plaintiff.
JOHN B. TANSIL
KENNETH R. L. SIMMONS
United States District Attorney, District Counsel U. S. I. I. S. Dept. Interior.

State of Montana,
County of Missoula—ss.

Russell E. Smith, being first duly sworn, deposes and says: That he is one of the attorneys for defendant Flathead Irrigation District in the above entitled action; that he did on the 26th day of October, 1937, mail a copy of the foregoing Proposed Findings and Conclusions to John P. Swee, Ronan, Montana, attorney for defendants Pablo and Swee.

RUSSELL E. SMITH

Subscribed and sworn to before me this 26th day of October, 1937.

[Seal] MARTHA ALSTEENS

Notary Public for the State of Montana, residing at Missoula, Montana.

My Commission expires May 28, 1939.

[Endorsed]: Filed Oct. 27, 1937. [196]

Thereafter, on October 27, 1937, the Defendants, the United States of America, et al., filed herein their objections to the proposed findings of the Flathead Irrigation District, which objections are in the words and figures following, to-wit: [197]

[Title of District Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY THE DEFENDANT, FLATHEAD IRRIGATION DISTRICT.

Comes now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and nineteen defendants specifically designated by name in the answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States

District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and files and enters the following objections and exceptions to the proposed findings of fact and conclusions of law of the defendant, Flathead Irrigation District: [198]

I.

Defendants have no objections or exceptions to paragraphs I, II, III, IV, and V of the Proposed Findings of Fact and to paragraphs I and II of the proposed Conclusions of Law of the defendant, Flathead Irrigation District.

II.

Defendants object and except to defendant's Proposed Finding of Fact contained in paragraph VI for the reason that the Secretary of the Interior was duly authorized by the United States under the provisions of the Acts of February 8, 1887 (24 Stat. L. 388) and June 21, 1906 (34 Stat. L. 354), to grant private water rights on the Flathead Indian Reservation under conditions prescribed by him.

Respectfully submitted,

JOHN B. TANSIL
United States Attorney for the District of Montana.

KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S., Department of the Interior.

Copies to:
E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff,
Pope & Smith, Missoula, Mont.
Attorneys for Defendant,
Flathead Irrigation District;
John P. Swee, Ronan, Mont.,
Attorney for Defendants,
Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Oct. 27, 1937. [199]

Thereafter, on October 22, 1937, the Defendants, the United States of America, et al., filed herein their objections to the proposed findings of the Plaintiff, Agnes McIntire, and the proposed findings of the Defendants Pablo and Sterling, which objections are in the words and figures following, to-wit: [200]

[Title of District Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFF AGNES McINTIRE AND THE DEFENDANTS ALEX PABLO AND A. M. STERLING.

Comes now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and nineteen defendants specifically designated by name in the

answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and files and enters the following objections and exceptions to the proposed findings of fact and conclusions of law of the plaintiff, Agnes McIntire and of the defendants, Alex Pablo and A. M. Sterling: [201]

I.

Defendants object and except to paragraph I of said proposed findings of fact, in particular to the statement "certain lands were ceded to the United States * * *" Under the Treaty of July 16, 1855 (12 Stat. L. 975) the Flathead, Kootenai and Upper Pend d'Oreilles tribes of Indians ceded their right to occupy a larger tract of territory and reserved their right of occupancy in and to the present Flathead Indian Reservation. The fee title in and to the larger as well as the smaller tract of land was before, at the time of and after the Treaty of 1855 in the United States and never in any of said tribes of Indians.

Defendants further object to the following statement contained in paragraph I: "The Indians dug large ditches from the running streams on said reservations, and carried the waters to their several tracts, for the purpose of irrigating the same" for the reason that such statement of fact is not sub-

stantiated by the evidence in said cause before the court.

II.

Defendants have no objections or exceptions to paragraph II of said proposed findings of fact.

III.

Defendants object and except to that portion of paragraph III of said proposed findings of fact wherein it is stated: "Said water became appurtenant to the lands so farmed, and the appropriations so made have never been abandoned", and "during his lifetime Michel Pablo used the waters conveyed by said ditch from Mud Creek, to the lands above described for the purpose of irrigation of said lands and for domestic use, and that after his death the said water has been continually used by his heirs, successors and assigns each year, and by the defendants Alex Pablo, A. M. Sterling and Agnes McIntire, to irrigate their respective lands hereinbefore described, and for domestic use," for the reason [202] that the waters of Mud Creek, save and except that amount granted the lands of plaintiff by the Secretary of the Interior in pursuance to the report of the private water rights committee on December 10, 1919 and approved by the Secretary of the Interior November 25, 1921, have never become appurtenant to the lands of plaintiff, either by act of the United States of America or the Secretary of the Interior, or by operation of law.

Defendants further object to said statements of fact for the reason that the evidence clearly shows

in this case that only a very small amount of the waters of Mud Creek has at any time been used on the lands of plaintiff and the defendants, Pablo and Sterling for stock and domestic purposes and for the irrigation of a small garden tract.

Defendants further object and except to the statements of fact contained in paragraph III of plaintiff's and defendants' Pablo and Sterling, proposed findings of fact for the reason that the evidence in the case clearly shows that the ditch constructed by Michel Pablo was not of sufficient size to carry 160 inches or 4 cubic feet of water per second of time from Mud Creek to the lands of plaintiff let alone of sufficient size to convey an additional 160 inches of water to the lands of Alex Pablo and A. M. Sterling, defendants herein.

Defendants further object and except to the statement of fact that the duty of water on said lands is one inch per acre for the reason that there is no limitation as to the period of the year within which said water is to be used and for the further reason that the evidence in this case does not support such a finding of fact.

IV

Defendants object and except to paragraph IV of said proposed findings of fact in its entirety. The evidence in the case clearly shows that there are numerous defendants using the waters of Mud Creek and its tributaries, under grants made by the Secretary [203] of the Interior, who are parties to this action, who have appeared and have been

represented at the trial of said cause, namely, the nineteen members of the Flathead tribe of Indians.

Defendants object and except to the following statement of fact that "the four are tenants in common, or joint tenants in the use of said waters of Mud Creek" for the reason that a tenancy in common or a joint tenancy cannot exist in this action.

Defendants object and except to the statement of fact that the waters of Mud Creek "can be divided, partitioned and separated" for the reason that an action in partition cannot lie where no joint tenancy or co-tenancy exists; that this is not an action in partition, but is, if anything, an action to quiet title to or to adjudicate the waters of Mud Creek.

V

Defendants object and except to the statement of fact contained in paragraph V of said proposed findings of fact to the effect that the waters of Mud Creek so appropriated were appurtenant to lands owned by said parties for the reason that no appropriation of waters under State law of otherwise can be validly made upon an Indian reservation and the waters of such streams can never become an appurtenance to the lands they irrigate except by express act of the United States or of the designated agent of the United States, the Secretary of the Interior.

VI

Defendants object and except to paragraph I of the proposed Conclusions of Law for the reason

that the ditch referred to never became an appurtenance to the lands now owned by plaintiff save and except as a means of conveyance for the water right granted said lands by the Secretary of the Interior as hereinbefore set out.

VII

Defendants object and except to paragraph II of said proposed Conclusions of Law for the following reasons: [204]

(1) That the only rights plaintiff or her predecessors in interest could acquire to the use of the waters of Mud Creek were rights granted the lands of plaintiff by the United States of America through the Secretary of the Interior, its designated agent, in accordance with Federal statutes:

(2) That no rights were ever granted the lands of plaintiff by the United States of America or the Secretary of the Interior to the use of 160 inches of the waters of Mud Creek or to the lands of the defendant, Alex Pablo to the use of 80 inches of the waters of Mud Creek or to the lands of A. M. Sterling to the use of 80 inches of the waters of Mud Creek;

(3) That the evidence in this case clearly shows that no such amounts of water were ever used upon said lands of the plaintiff or of the defendants, Pablo and Sterling;

(4) That the evidence in the case clearly shows that no use of the waters of Mud Creek save for stock and garden purposes was made for a period

of over more than ten years immediately preceding the filing of the bill of complaint in this action;

(5) That the right to use said amounts of water, if any right ever existed, has been abandoned by plaintiff and the defendants, Pablo and Sterling, by non-use for a period of more than ten years in pursuance to the Statutes of the State of Montana.

VIII

Defendants object and except to paragraph III of said proposed Conclusions of Law in its entirety for the reason that all acts done by the Project Engineer of the Flathead Irrigation Project and other employees of the Flathead Irrigation Project in maintaining a dam in Mud Creek and in diverting the waters of Mud Creek for use in the Flathead Irrigation Project System have been done in pursuance to Acts of Congress and in pursuance to instructions of the Secretary of the Interior made thereunder.

Respectfully submitted,
JOHN B. TANSIL
United States Attorney for
the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.,
Department of the Interior.

Copies to:

E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff;

Pope & Smith, Missoula, Mont.
Attorneys for Defendant, Flathead Irrigation District;

John P. Swee, Ronan, Mont.,
Attorney for defendants, Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Oct. 22, 1937. [205]

Thereafter, on October 27, 1937, Court entered an

ORDER DENYING THE PETITION OF FLATHEAD IRRIGATION DISTRICT FOR A RE-HEARING

herein, the minute entry of said order being in the words and figures following, to-wit: [206]

[Title of District Court and Cause.]

This cause came on regularly for hearing this day on the Petition for re-hearing, and on the applications for adoption of Findings of Fact and Conclusions of Law, Mr. Elmer E. Hershey appearing for the plaintiff, Mr. Russell Smith appearing for the Flathead Irrigation District, and Mr. John B. Tansil U. S. Attorney and Mr. Kenneth R. L. Simmons, District Counsel U. S. Indian Irrigation Service, appearing for the United States and the several defendants represented by them.

Thereupon the Petition for re-hearing was argued by Mr. Smith and Mr. Hershey, submitted to the court, and by the court denied.

Thereupon the application for the adoption of proposed Findings of Fact and Conclusions of Law, and the objections thereto, were heard and submitted and by the court taken under advisement.

Thereupon, on motion of Mr. Simmons, court signed and ordered entered the following written order:

"Title of Court and Cause.

Order.

Upon application of the United States of America, Henry Gerharz, Project Engineer, and the nineteen members of the Flathead Tribe of Indians, defendants herein, it appearing to the court a proper case therefor,—

It is Ordered that the time for preparing and lodging in the office of the Clerk of the above entitled court their statement of the evidence in the above entitled cause, be and the same is hereby extended to and including the twenty-fifth day of December, 1937."

Entered in open court October 27, 1937.

C. R. GARLOW,
Clerk. [207]

Thereafter, on October 27, 1937, an order was duly entered herein granting the United States of America, et al., to and including December 25, 1937, in which to prepare and lodge in the Clerk's office

their proposed Statement of Evidence, which order is in the words and figures following, to-wit: [208]

[Title of District Court and Cause.]

ORDER

Upon application of the United States of America, Henry Gerharz, Project Engineer, and the nineteen members of the Flathead Tribe of Indians, defendants herein, it appearing to the Court a proper case therefor;—

It Is Ordered that the time for preparing and lodging in the office of the Clerk of the above entitled court their statement of the evidence in the above entitled cause, be and the same is hereby extended to and including the twenty-fifth day of December, 1937.

Dated this 27th day of December, 1937.

CHARLES N. PRAY
United States District Judge
for the District of Montana.

[Endorsed]: Filed October 27, 1937. C. R. Garlow, Clerk. [209]

Thereafter, on November 6, 1937, Findings of Fact and Conclusions of Law, proposed by Plaintiff, were adopted and signed by the Court, and were filed herein, in the words and figures following, to-wit: [210]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I

On July 16, 1855, (12th Stat. L. 975) what is known as the Stevens Treaty was made by the United States and the Flathead, Kootenay, and Upper Pend d-Oreilles Indians, as a Confederated Tribe. Certain lands were ceded to the United States, and a large tract of certain other lands were reserved for the exclusive use and occupation of said Indians, which were thereafter known as the Flathead Indian Reservation.

The Indians fenced up large tracts of land in severalty, and farmed the same, and in every way said Indians were encouraged to abandon their habits as a nomadic peoples, and become self-supporting.

That the lands on said reservation were arid, and, without aid of irrigation, were useless, and the Indians dug large ditches from the running streams on said reservation, and carried the waters to their several tracts, for the purpose of irrigating the same.

II

Congress of the United States, by an Act approved April 23, 1904, (33rd Stat. L. P. 302) opened said Flathead Indian [211] Reservation for allottment and sale, and thereafter, on June 21, 1906 (34th Stat. L. P. 354) amended said Act by adding certain sections, Section 19 reading as follows:

"Section 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use, or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

III

That sometime prior to 1891, Michael Pablo, who was then in possession of a large tract of land, dug and constructed a ditch from Mud Creek to the lands so farmed by him, and used the water upon said lands in raising crops and said water became appurtenant to the lands so farmed, and the appropriations so made has never been abandoned.

That on January 25, 1918, patent in fee was issued to Agatha Pablo, wife of Michael Pablo, for the lands allotted to him and on October 5, 1918, a fee patent was issued to Agatha Pablo for certain lands allotted to Lizette Barnaby, which lands were a part of the lands so fenced by said Michael Pablo, and farmed by him, and for which said appropriation was made, as aforesaid.

Said lands are described in said patents as the West Half of the Northeast Quarter, and the East Half of the Northeast Quarter of Section Fourteen, Township Twenty-one, North, Range Twenty, West, Montana Meridian, and are now owned by plaintiff

herein, Agnes McIntire, together with the water rights appurtenant to said lands.

That Alix Pablo, defendant herein, a son of Michael Pablo, was allotted the North Half of the Northwest Quarter of [212] Section Fourteen, Township Twenty-one, North, Range Twenty-West, and A. M. Sterling is the owner of the South Half of the Northwest Quarter of Section Fourteen, Township Twenty-one, North, Range Twenty West, allotted to Agatha Pablo, wife of said Michael Pablo, together with the water appurtenant thereto. Said lands were patented to said allottee, who thereafter sold said lands to said defendant A. M. Sterling.

That the original ditch dug by said Michael Pablo, prior to 1891, was of sufficient size and carrying capacity to carry said water, and said ditch carried said water to the lands above described, and was used for the proper irrigation of said lands.

That said lands require one inch to the acre for the proper irrigation thereof.

IV

That no other parties are using the waters of said Mud Creek except this plaintiff Agnes McIntire, and defendants Alix Pablo, A. M. Sterling, and the United States, acting through the Flathead Reclamation Project, and that the four are tenants in common, or joint tenants in the use of said waters of Mud Creek.

That the waters of said Mud Creek can be divided, partitioned and separated so that the amount

of water this plaintiff has a right to use can be determined. It can also be determined the amount of water that Alix Pablo and A. M. Sterling are entitled to use, who were made defendants in this case in order that their rights might be determined, and who are now claiming rights to said waters.

The other defendants mentioned in the complaint were named in order that they might have an opportunity to set forth any rights or interests claimed by them, but no rights are claimed, [213] except through the Flathead Reclamation Project, by those who filed similar answers to that filed by the United States. A great many of the other defendants have made default, and their default has been duly entered herein.

V

That defendant Henry Gerharz is the Engineer and Project Manager of the Flathead Indian Reclamation Project in the State of Montana, and as such Engineer and Project Manager, has charge of the construction, operation, management and control of said irrigation project, and as a part of the work done by him operates and maintains ditches and dams upon said reservation.

That as such Engineer and Project Manager, said defendant is in direct charge of what is known as the Pablo Feeder Canal, which crosses Mud Creek, and, at said point, a dam is maintained by said Project Manager, turning all of the waters of Mud Creek into said Canal, and depriving this plaintiff, Agnes McIntire, and defendants Alix Pablo and

A. M. Sterling of the waters so appropriated, prior to 1891, and appurtenant to the lands owned by said parties.

CONCLUSIONS OF LAW

I

That the ditch originally built prior to 1891 was appurtenant to the lands herein described, and the same recognized and confirmed by said Act of June 21, 1906, and as the private property of said Indian allottees, was by them conveyed to plaintiff's predecessors, and plaintiff is now the owner thereof, and likewise to defendants' predecessors and said defendants are now the owners thereof. [214]

II

That the lands herein described as privately owned, are entitled in the case of plaintiff, to 160 inches, or four cubic feet of water per second from Mud Creek, and lands of Alix Pablo are entitled to 80 inches, or two cubic feet of water per second of the waters of Mud Creek, and the lands of A. M. Sterling are entitled to 80 inches of water, or two cubic feet per second of the waters of Mud Creek, and as such owners are entitled to non-molestation to the full extent of their necessities.

III

That the maintaining of said dam in Mud Creek, and depriving these parties of the waters, the use of which is owned by these defendants, is wrongful and unlawful, and in violation of the Act of Congress, allotting the lands on said reservation, and

such interference with said private ditch and water right is mere trespass, for which said Project Manager must personally account, and for which his employment is no defense.

Opinion incorporated.

Dated this 6th day of November, 1937.

CHARLES N. PRAY
Judge.

Copies to:

Kenneth R. L. Simmons, Billings, Montana.
Pope & Smith, Missoula, Montana.
John P. Swee, Ronan, Montana.
John B. Tansil, U. S. District Atty. Butte, Montana.

[Endorsed]: Adopted by the Court and Filed Nov. 6, 1937. [215]

Thereafter, on November 6, 1937, Findings of Fact and Conclusions of Law, proposed by Defendants Pablo and Sterling, were adopted and signed by the Court, and were filed herein, in the words and figures following, to-wit: [216]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DEFENDANTS, ALEX PABLO AND A. M. STERLING.

I

On July 16, 1855, (12th Stat. L. 975) what is known as the Stevens Treaty was made by the

United States and the Flathead, Kootenay, and Upper Pend d-Oreilles Indians, as a Confederated Tribe. Certain lands were ceded to the United States, and a large tract of certain other lands were reserved for the exclusive use and occupation of said Indians, which were thereafter known as the Flathead Indian Reservation.

The Indians fenced up large tracts of land in severalty, and farmed the same, and in every way said Indians were encouraged to abandon their habits as a nomadic people, and become self-supporting.

That the lands on said reservation were arid, and, without aid of irrigation, were useless, and the Indians dug large ditches from the running streams on said reservation, and carried the waters to their several tracts, for the purpose of irrigating the same.

II

Congress of the United States, by an Act approved April 23, 1904, (33rd Stat. L. P. 302) opened said Flathead Indian [217] Reservation for allottment and sale, and thereafter, on June 21, 1906 (34th Stat. L. P. 354) amended said Act by adding certain sections, Section 19 reading as follows:

> "Section 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domes-

tic use, or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

II

That sometime prior to 1891, Michel Pablo, who was then in possession of a large tract of land, dug and constructed a ditch from Mud Creek to the lands farmed by him and the lands of his wife and children, and used the water upon said lands in raising crops and said water became appurtenant to the lands so farmed, and the appropriations so made has never been abandoned.

That the defendant Alex Pablo, was alloted by the United States of America upon the North half of the Northwest Quarter (N½NW¼) of Section Fourteen (14) In Township Twenty One (21) North of Range Twenty West (20W), Montana Meridian, Montana, and that he has never received a patent covering said land and that the same is held in trust by the United States Government, for said Alex Pablo, who is a Member of the Flathead Tribe of Indians, together with the water rights appurtenant thereto.

That the defendant A. M. Sterling is the owner of the land that formerly belonged to Agath Pablo, wife of Michel Pablo, having acquired the same by deed from said Agatha Pablo, on or about the 25th day of November 1925, said land being located in the County of Lake, State of Montana, to-wit: The South-half of the Northwest Quarter (S½NW¼) of Section Fourteen (14) In Township Twenty One

(21) North of Range Twenty (20) West of the Montana Meridian, Montana, together with the water rights appurtenant to saod lands.

That the plaintiff is the owner of certain lands that formerly was owned by [218] Agatha Pablo the wife of Michel Pablo, said lands having formerly been alloted to Michel Pablo, and to Lizette Barnaby, and which later were patented and acquired by Agatha Pablo, and are now owned by the plaintiff Agnes McIntire the plaintiff, said lands being located in the County of Lake State of Montana to-wit: The West-half of the Northeast Quarter ($W\frac{1}{4}NE$) and the East-Half of the Northeast Quarter ($E\frac{1}{2}NE$) of Section Fourteen (14) In Township Twenty One (21) North of Range Twenty (20) West of the Montana Meridian, to-Twenty (20) West of the Montana Meridian, Montana, together with the water rights appurtenant to said lands.

That the original ditch dug by Michel Pablo, prior to 1891, was of sufficient size and carrying capacity to carry said water to the lands above described, and was used for the proper irrigation of said lands and that all of said lands was included in the Notice of Appropriation, execution and *file* by Michel Pablo, in the office of the Clerk and Recorder of Missoula County, Montana, on the 14th day of November 1907, in which Notice the said Michel Pablo, claimed a legal right to the use, possession and control of 80 inches of water for the lands of Alex Pablo, 80 inches for the lands of A. M. Sterling and 80 inches for each of the eighty acre tracts

now owned by the plaintiff, of the waters of Mud Creek, and that during his life time Michel Pablo used the waters conveyed by said ditch from Mud Creek, to the lands above described for the purpose of Irrigation of said lands and for domestic use, and that after his death the said water has been continually used by his heirs, successors and assigns each year, and by the defendants Alex Pablo, A. M. Sterling and Agnes McIntire, to irrigate their respective lands hereinbefore described, and for domestic use.

That said lands require an inch to the acre for the proper irrigation thereof.

IV

That no other parties are using the waters of Mud Creek except Alex Pablo, A. M. Sterling, defendants herein and Agnes McIntire the plaintiff and *and* the United States, acting through the Flathead Reclamation Project, and that the four are tenants in common, or joint tenants in the use of the waters of said Mud Creek. [219]

That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff has a right to use can be determined. It can also be determined the amount of water that Alex Pablo and A. M. Sterling are entitled to use, who were made defendants in this case in order that their rights may be determined, and who are now claiming rights to said water.

The other defendants who are mentioned in the

complaint were named in order that they might have an opportunity to set forth any rights or interests claimed by them, but no rights are claimed except through the Flathead Reclamation Project, by those who filed similar answers to that filed by the United States. A great many of the other defendants have made default, and their default has been duly entered herein.

V

The defendant Henry Gerharz is the engineer and Project Manager of the Flathead Reclamation Project in the State of Montana, and as such Engineer and Project Manager, has charge of the construction, management and control of said irrigation project, and as a part of the work done by him operates and maintains ditches and dams upon said reservation, that as such Engineer and Project Manager, said defendant is in direct charge of what is known as the Pablo Feeder Canal, which crosses Mud Creek, and, at said point, a dam is maintained by said Project Engineer and Manager, turning all of the waters of Mud Creek into said canal, and depriving the plaintiff, Agnes McIntire, and the defendants Alex Pablo and A. M. Sterling of the waters so appropriated, prior to 1891, and appurtenant to the lands owned by the said parties.

CONCLUSIONS OF LAW

I

That the ditch built prior to 1891 was appurtenant to the lands herein described, and the same

recognized and confirmed by the Act of June 21, 1906, and as the private property of said Indian Allottees, was by them conveyed to plaintiffs predecessors, and the predecessors of the defendants Alex Pablo and A. M. Sterling, and that they are now the owners thereof.

II

That the lands herein described are privately owned, and are entitled in the case of the plaintiff, to 160 inches, or four cubic feet of water [220] per second from Mud Creek, and lands of Alex Pablo are entitled to 80 inches, or two cubic feet of water per second of the waters of Mud Creek, and the lands of A. M. Sterling are entitled to 80 inches of water or two cubic feet per second of the waters of Mud Creek, and as such owners are entitled to non-molestation to the full extent of their necessities.

III

That the maintaining of said dam in Mud Creek, and depriving these parties of the waters, the use of which is owned by the plaintiff and the defendants Alex Pablo and A. M. Sterling, is wrongful and unlawful, and in violation of the Act of Congress, allotting the lands on said reservation, and such interference with said private ditch and water right is mere trespass, and for which said Project Manager must personally account, and for which his employment is no defense.

Dated this 6th day of November 1937.

CHARLES N. PRAY
Judge.

Copies to

Kenneth R. L. Simmons, Billings, Montana,
Elmer E. Hershey, Missoula, Montana,
Pope and Smith, Missoula, Montana,
John B. Tansil, U. S. Dist. Attorney, Butte, Montana.

[Endorsed]: Adopted by the Court and Filed Nov. 6, 1937. [221]

Thereafter, on November 8, 1937, the United States of America, et al., filed herein their Objections and Exceptions to the Findings and Conclusions of the Court, in the words and figures following, to-wit: [222]

[Title of District Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW OF PLAINTIFF, AGNES McINTIRE AND THE DEFENDANTS ALEX PABLO AND A. M. STERLING ADOPTED BY THE COURT.

Comes Now the United States of America, Henry Gerharz, Project Engineer of the Flathead Indian Irrigation Project, incorrectly designated in the title of the amended bill of complaint as Project Manager of the Flathead Reclamation Project, and

nineteen defendants specifically designated by name in the answer filed by them to the amended bill of complaint, all members of the Flathead tribe of Indians and wards of the United States of America, defendants herein, by and through the United States District Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, Department of the Interior, and files and enters the following objections and exceptions to the findings of fact and conclusions of law submitted by the plaintiff and by the defendants Alex Pablo and A. M. Sterling, and adopted by the above entitled Court on the sixth day of November, 1937. [223]

(1) Defendants object and except to each and every adopted finding of fact and conclusion of law for the reasons heretofore stated in defendant's objections and exceptions to the findings of fact and conclusions of law proposed by plaintiff Agnes McIntire and the defendants Alex Pablo and A. M. Sterling on file in said action.

Respectfully submitted,
JOHN B. TANSIL
United States Attorney for
the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.,
Department of the Interior.

Copies to:

E. E. Hershey, Missoula, Mont.
Attorney for Plaintiff,
Pope & Smith, Missoula, Mont.
Attorneys for Defendant, Flathead Irrigation District;
John P. Swee, Ronan, Mont.,
Attorney for defendants, Alex Pablo and A. M. Sterling.

[Endorsed]: Filed Nov. 8, 1937. [224]

Thereafter, on November 17, 1937, the Decree of the Court was duly signed, filed and entered herein, in the words and figures following, to-wit: [225]

In the District Court of the United States for the District of Montana, Missoula Division.

Equity No. 1496.

AGNES McINTIRE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of Interior, HENRY GERHARZ, Project Manager of Flathead Reclamation Project, ALEX PABLO, A. M. STERLING, LOU GOODALE BIGELOW KROUT, ALPHONSE CLAIRMONT, FLATHEAD IRRIGATION DISTRICT, a corporation, ALICE CLAIRMONT, HENRY CLAIRMONT, GRACE CLAIRMONT, B. D. LIEBEL, PETER OLIVER DUPUIS, MARY PABLO, CHAS. FERGUSON, FRED & EMIL KLOSSNER, EMANUEL HUBER, JOSEPH A. PAQUETTE, FRED C. GUENZLER, ANNIE RAITOR, CLARENCE BILILE, ALEX SLOAN, JACOB M. REMIERS, Administrator of the estate of R. W. Jamison, deceased, GEORGE SLOANE, HATTIE ROSE SLOAN HASTINGS, HELGA VESSEY, E. D. HENDRICKS, LILLIAN CLAIRMONT THOMAS, EUGENE CLAIRMONT, EDWIN DUPUIS, GERTRUDE E. STIMSON, W. B. DEMMICK, ROSE ASHLEY, HENRY ASHLEY and W. A. DUPUIS,

Defendants.

DECREE.

This cause came on to be heard at this term, and testimony was taken, and was argued by counsel, and an opinion was given; and thereupon, upon the consideration thereto, it was ordered, adjudged and decreed as follows, viz.:

That plaintiff, Agnes McIntire, and the defendants A. M. Sterling and Alex Pablo, are entitled to the full extent of their necessities, to sufficient waters to irrigate their said lands, which in no event will exceed one inch per acre, of the waters of Mud Creek, a natural stream of flowing water in Lake County, Montana, for use upon the West half of the Northeast Quarter, and the East half of the Northeast Quarter of Section Fourteen, Township Twenty-one North, Range Twenty West, Montana [226] Meridian, containing 160 acres, and the South half of the Northwest Quarter of Section Fourteen in Township Twenty One North of Range Twenty West, Montana Meridian, containing 80 acres and the North half of the Northwest Quarter of Section Fourteen in Township Twenty-one North of Range Twenty West, Montana Meridian, containing 80 acres, without interference or molestation on the part of defendants, and the Project Engineer of the Flathead Indian Irrigation Project, or the Project Manager of the Flathead Reclamation Project, Henry Gerharz, and those acting with him, his agents and attorneys, in charge of the construction, operation, management and control of said Irrigation Project, and that they be enjoined and re-

strained from interfering with the rights of the plaintiff, Agnes McIntire, and defendants A. M. Sterling and Alex Pablo, as aforesaid, and from damming up, or maintaining any dam on Mud Creek, whereby said waters will be diverted or turned from the main channel of Mud Creek in any way so that this plaintiff Agnes McIntire and the defendants A. M. Sterling and Alex Pablo would be deprived of the waters herein described, the use of which water, is the private property of said plaintiff Agnes McIntire and defendants A. M. Sterling and Alex Pablo, and appurtenant to their lands.

Opinion and findings incorporated herein.

Dated this 17th day of November, 1937.

CHARLES N. PRAY,
Judge.

Copies to

Kenneth R. L. Simmons, Billings, Montana;
E. E. Hershey, Missoula, Mont.;
Pope & Smith, Missoula, Mont.;
John P. Swee, Ronan, Montana;
John B. Tansil, United States Attorney, Butte, Montana.

[Endorsed]: Filed Nov. 17, 1937. [227]

Thereafter, on November 30, 1937, the Statement of Evidence, which was lodged herein on November 18, 1937, was approved by the Court and filed herein, in the words and figures following, to-wit: [228]

[Title of District Court and Cause.]

PROPOSED STATEMENT OF EVIDENCE OF DEFENDANTS UNITED STATES OF AMERICA HENRY GERHARZ PROJECT ENGINEER AND 19 MEMBERS OF THE FLATHEAD TRIBE OF INDIANS.

Be it Remembered: That the above entitled cause came regularly on for trial at Missoula, Montana, at ten o'clock a. m. on Monday the 23rd day of November, 1936, before the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, sitting without a jury.

Plaintiff was represented at the trial of said cause by Elmer E. Hershey, Esquire, Attorney at law, Missoula, Montana. The United States of America, defendant, and all other defendants except Alex Pablo, A. M. Sterling and Flathead Irrigation District, a corporation, were represented by John B. Tansil, United States District Attorney for Montana, Roy F. Allen, Assistant United States District Attorney for Montana, and Kenneth R. L. Simmons, District Counsel, Department of the Interior, U. S. I. I. S. Defendants Alex Pablo and A. M. Sterling were represented by John P. Swee, Esquire, attorney at law of Ronan, Montana. Defendant Flathead Irrigation District, a corporation,

was represented by the law firm of Pope and Smith, Missoula, Montana, solicitors for said District. [229]

Thereupon the following proceedings were had and taken and the following evidence and none other was introduced.

The Court: Gentlemen, we have one case set for today, I believe there are some motions pending, to be overruled and denied, and answers filed; are you ready for that step? We will proceed with the case on the calendar. Those motions may be overruled and denied, and you are ready to file your answers now, I understand.

(And thereupon answers were handed to the clerk and filed.)

The Court: Have you received copies of these answers?

Mr. Hershey: They were just handed me about a minute ago.

The Court: I suppose you know about the line of defense?

Mr. Hershey: Yes; and we will file written replies to them a little later on. For the present, during the trial, if it may be considered that all the affirmative defenses are deemed denied, except as set forth in the plaintiff's complaint?

The Court: Yes; I think the equity rule will cover that anyhow; they will be deemed denied, under the rule, anyhow. They will be filed, and there may be some new matters you will wish to specifically answer. You may give a brief outline of what you propose to do, of what your proof is and what you do, under the pleadings; just a brief statement.

Opening statement on behalf of plaintiff was then made by Mr. Hershey.

Mr. Hershey: I desire, before I start in on that proposition to call your Honor's attention to certain sections of the Codes of Montana as to water rights. I desire to call your Honor's attention to Section 7105, rights settled in one action, the Codes of 1935. I also desire to call your attention to Section 7099 of the Codes, the right of the United States to make appropriation of water in this state; and I also desire to call your Honor's attention to 7107, how water is measured in this state, cubic foot of water.

[230]

Mr. Simmons: May we make our opening statement?

The Court: Yes you may make a brief statement, Mr. Simmons.

Opening statement was then made by Mr. Simmons.

Mr. Hershey: In view of the statement possibly I had better start at the beginning and introduce the pleadings. I have here a copy of the treaty.

Mr. Pope: If your Honor please.

The Court: Yes, and there are others here. Whom do you represent?

Mr. Pope: Mr. Smith and I represent the Flathead Irrigation District.

Opening statement was then made by Mr. Pope.

Mr. Swee: I appear for Alex Pablo, son of old Michel Pablo, and A. M. Sterling. Mr. Sterling is the purchaser of the Agatha Pablo allotment which is the allotment of Michel Pablo's wife, both of them being now dead.

Opening statement was then made by Mr. Swee.

The Court: Anything further? If not we will proceed.

And thereupon the following evidence was offered by the plaintiff in behalf of her case in chief.

Mr. Hershey: In view of what has been said I think I had better start with the treaty itself.

The Court: Very well.

Mr. Hershey: This treaty was made on July 16, 1855, and it describes a large area of land.

The Court: That is the Stevens Treaty?

Mr. Hershey: This is known as the Stevens Treaty.

The Court: Yes.

Mr. Hershey: And it describes a large area of land on which the Indians were then living. And then Article 2 provides that "There is however reserved from the lands above described for the use and benefit of said confederated tribes, and as a general Indian Reservation on which may be placed other confederated tribes and bands of Indians under the common designation The Flathead Nation, with Victor head chief of the Flathead Indians * * * the tract of land described within the following boundaries, to-wit:"—I will skip that—"All of which tracts will be set apart and as far as necessary surveyed * * * for the benefit of said confederated tribes, as an Indian Reservation." Now there is more to that: "No white man shall go on the Reservation without their consent to enter thereon," and various exclusive rights as to hunting and fishing and so on, reserved to the Indians. I have a

copy taken from one of the two original copies of the treaty. The chief of the Reservation has one of those copies and this is taken directly from that. I have compared it also with the published accounts of it and it is correct, word for word, as it was written. I am merely offering this simply to save bringing up the treaty itself.

The Court: Of course if counsel has seen that copy it can go in and be among the files of the case, if you are satisfied with its accuracy.

Mr. Pope: We have never seen it.

Mr. Hershey: I will state that I compared that myself, with an employe, and it is as nearly perfect as I could make it. It was written in longhand, one of the originals—that was claimed to be one of the originals—that was signed by Stevens at that time.

Mr. Hershey: Then on the 25th day of January, 1918, a patent was issued to the allotment of Michel Pablo, to Agatha Pablo, for the W½ NE¼ of Section 14, Township 21 N. R. 20 W. We offer that.

Mr. Simmons: You are not offering the treaty?

Mr. Hershey: Well, all right.

The Court: Well he referred to the treaty."

ELMER E. HERSHEY

Attorney for the plaintiff, Agnes McIntire, offered in evidence certain exhibits in behalf of plaintiff.

PLAINTIFF'S EXHIBIT ONE.

Admitted

(Certified by the clerk and recorder of Lake County, Montana, on November 20, 1936, as a true, full and correct copy of said instrument filed in his office for record on April 19, 1930, at 11:39 o'clock a. m., and recorded in Book "C" of Deeds at page 304, records of Lake County.)

Transcribed from Missoula County Records, Deed Book 90, page 566.

90-566 Compared Compared

[231]

751391 -36247-

50837-17. I. O. 4-1061

1148

The United States of America to all to whom these presents shall come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant Agatha Pablo, purchaser of land included in the allotment of Michel Pablo, and described as the West half of the northeast quarter of Section fourteen in Township twenty-one North of Range twenty west of the Montana Meridian, Montana, containing eighty acres.

Now Know Ye, that the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said claimant and to the heirs of the said claimant the lands above described: To have

and to hold the same together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. The lands hereby conveyed are subject to a lien, prior and superior to all other liens, for the amount costs and charges due to the United States for and on account of construction of the irrigation system or acquisition of water rights by which said lands have been or are to be reclaimed, as provided and prescribed by the Act of Congress of May 18, 1916, (39 Stat., 123), and the lien so created is hereby expressly reserved.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

[232]

Given under my hand, at the City of Washington, the twenty-fifth day of January in the year of our Lord one thousand nine hundred and eighteen and of the Independence of the United States the one hundred and forty-second.

By the President:

[Seal] WOODROW WILSON

By M. P. LeROY,

Secretary

L. Q. C. LAMAR,

Recorder of the General Land Office

Recorded: Patent Number 615136. Entered on Tract Book 11 A P 181 R. 2-6-18.

Filed for Record on the 19th day of April, 1920 at 11:39 o'clock a. m. W. J. Babington, County Clerk, by R. J. Cyr, Deputy.

PLAINTIFF'S EXHIBIT TWO

Admitted

(Certified by clerk and recorder Lake County, Montana, as a true, full and correct copy of said patent, filed for record April 19, 1920, at 11:38 o'clock a. m., recorded in Book "C" of Deeds, page 303, records of Lake County, Montana.)

Transcribed from Missoula County Records, Deed Book 90, page 565.

90-565 Compared Compared
648499 -36246-
83815-16 I. O. 4-1061
1429

The United States of America to all to whom these presents shall come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimant Agatha Pablo, purchaser of land included in the allotment of Lizette Barnaby, and described as the East half of the northeast quarter of Section fourteen in Township twenty-one North of Range twenty west of the Montana Meridian, Montana, containing eighty acres;

Now Know Ye, That the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said claimant and to the heirs of [233] the said claimant the land above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the fifth day of October in the year of our Lord one thousand nine hundred sixteen and of the Independence of the United States the one hundred and forty-first.

By the President:
WOODROW WILSON
By M. P. LEROY,
Secretary

L. Q. C. Lamar, Recorder of the General Land Office. Recorded Patent Number 548935. Entered on Tract Book mms. Filed for Record on the 19th day of April, 1920, at 11:38 o'clock a. m. W. J. Babington, County Clerk. By R. J. Cyr, Deputy.

PLAINTIFF'S EXHIBIT THREE

Admitted

DEED ON ORDER OF SALE

This Indenture made the 25th day of September in the year of our Lord, one thousand nine hundred and twenty-four (1924), between W. R. Kelly, Sheriff of the County of Lake, State of Montana, the party of the first part, and J. L. McIntire, the party of the second part, witnesseth:

Whereas, in and by a certain judgment or decree made and entered by the District Court in and for Lake County, State of Montana, on the 25th day of July A. D. 1923, in a certain action [234] then pending in said court, wherein J. L. McIntire was plaintiff and Agatha Pablo was defendants and of which said judgment or decree a certified copy with an order of sale from said court was delivered to said party of the first part, as such Sheriff, for execution, it was among other things ordered, adjudged and decreed that all and singular the mortgaged premises described in the complaint in said action, specifically described in said judgment or decree, should be sold at public auction by the Sheriff of the said County of Lake, in the manner required by law and according to the course and practice of said court; that any of the parties to said action might become the purchaser at such sale, and that such Sheriff should execute the usual certificate and deed to the purchaser or purchasers, as required by law;

And Whereas, the said Sheriff did at the hour of 2 o'clock p. m. on the 24th day of September, A. D. 1923, after due public notice had been given as required by the laws of this State and the course and practice of said Court, duly sell at public auction in the said county of Lake agreeably to said judgment or decree and the provisions of law, the premises in the said decree or judgment mentioned, at which sale the premises in said judgment or decree, and hereafter described, were fairly struck off to the said J. L. McIntire, the said party hereto of the second part, for the sum of Thirty-eight hundred ninety-eight 23/100 Dollars, J. L. McIntire being the highest bidder and that being the highest sum bid for the same;

And Whereas, the said J. L. McIntire thereupon paid to the said Sheriff the sum of money so bid by him;

And Whereas, the said Sheriff thereupon made and issued the usual certificate in duplicate of the said sale in due form of law and delivered one thereof to the said purchaser, J. L. McIntire, and caused the other to be filed in the office of the County Recorder of said County of Lake; [235]

And Whereas, more than twelve months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid by or on behalf of the said judgment debtor, the said Agatha Pablo, Great Western Land Co., *Roan* State Bank, and Louise J. Smith, or by or on behalf of any other person.

Now this Indenture Witnesseth, that the said party of the first part, the said Sheriff, in order to

carry into effect the sale so made by him as aforesaid in pursuance of said judgment or decree and in conformity to the statute in such cases made and provided, and also in consideration of the premises and of the sum of Thirty-eight hundred ninety-eight 23/100 Dollars so bid and paid to him by the said purchaser J. L. McIntire, the said W. R. Kelly, Sheriff, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns forever, all that certain lot, piece or parcel of said land, situate, lying and being in the said County of Lake, State of Montana, and bounded and particularly described as follows, to-wit:

> The East half of the Northeast quarter (E½ NE¼) and the West half of the Northeast quarter (W½NE¼) Section Fourteen (14) in Township Twenty-one (21) North of Range Twenty (20) West of the Montana Meridian, Montana, containing 160 acres more or less.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as the said Sheriff can, may or ought to, by virtue of the said writ and of the statute in such case made and provided, grant, bargain, sell, convey and confirm the same. [236]

In Witness Whereof, the said Sheriff, the said party of the first part, has hereunto set his hand and seal the day and year first above written.

.....

[Seal] W. R. KELLY,
Sheriff of the County of Lake, State of Montana.

Signed, Sealed and Delivered in the presence of
($4.00 Internal Revenue Stamps attached and canceled)

(Acknowledged September 25, 1924, before Stella M. Upham, Notary Public)

(Received for record September 26, 1924, at 9:55 o'clock a. m., and recorded in Volume 2, Deed Records of Lake County, Montana, page 249)

PLAINTIFF'S EXHIBIT FOUR

Admitted

(Plaintiff's Exhibit 4 is a warranty deed from J. L. McIntire to the plaintiff, Agnes McIntire to the property described in plaintiff's Exhibit 3).

JOHN ASHLEY

was called as a witness on behalf of the plaintiff and having been first duly sworn upon direct examination testified as follows:

Direct Examination

By Mr. Hershey:

I live at Pablo, Montana on the Flathead Indian Reservation. I have lived there all my life. I am 77

(Testimony of John Ashley.)

years old. I am an Indian allottee. Knew Michel Pablo when he lived on his allotment. Pablo had his lands fenced. He had cattle on his lands and farmed them to some extent. He raised wheat and oats and used water for the irrigation of the same from Mud Creek, which he carried through a ditch. This ditch was over a mile long, three feet wide at the bottom and about two feet deep. It was about fifteen feet deep as it went through a cut of about 200 yards. About 150 yards of the ditch was made out of logs. The land had to be dammed.

The Lizette Barnaby allotment was owned by Michel Pablo when the ditch was built. Pablo just used this allotment for pasture. [237] He had water on the allotment. This ditch was dug prior to the opening of the Flathead Indian Reservation. Michel Pablo used this ditch on his land, and on Alex Pablo and on Joe Pablo's lands. When water was turned in the ditch it filled it.

I worked on the ditch up at the head and changed it for about 300 yards at the request of Michel Pablo. The ditch was placed so that you could use water on the Lizette Barnaby and the Michel Pablo land. After the ditch was changed Pablo was raising hay and oats and once in a while wheat. The oats was as high as six feet. Pablo had from six to nine thousand cattle upon this land which he was raising feed for while he was living. He also had

(Testimony of John Ashley.)
five or six hundred head of buffalo there. This condition existed before and after I changed the ditch.

Cross Examination

By Mr. Simmons:

I do not know the year Michel Pablo died. After the ditch went dry, at Pablo's request I dug it over. This was before the reservation was opened. I do not know the year the reservation was opened. The grade of the ditch was about a quarter of an inch to a rod. Three 80 acre tracts were irrigated of the Michel Pablo lands through this ditch. Pretty near all of the land on these three eighties was irrigated. These eighties were Alex Pablo's, Agatha Pablo's (Michel Pablo's wife) and Joe's, part of the old man's right alongside of the fence. The Lizette Barnaby tract was used for pasture. The entire eighty was used as pasture, the brush and everything. No crop was grown on this land only a small garden. It took old man Frank Busquet, who is now dead, and me, about a month and a half to build this ditch.

Redirect Examination

By Mr. Hershey:

The garden on the Barnaby land was quite a large garden. He had a large force there to feed and was raising vegetables to supply his own needs.

[238]

ELMER E. HERSHEY

was called as a witness on behalf of the plaintiff and having been first duly sworn upon

Direct Examination

testified as follows:

I will state that I was admitted to practice in this state June 2, 1891, and with then Lieutenant McAlexander—afterwards Brigadier General McAlexander—the "Rock of the Marne," we entered a partnership, and we filed what is known as the Williams Addition to Demersville; and the boats were running up there and landing on Williams' land, and I went up to settle the troubles we were having; and on June 20, 1891,—evidently I had returned—I made a charge for the trip; if you gentlemen want to see it here it is down at the bottom. And I will state that I passed by this place and there was water coming through there in quite a large quantity. My recollection is now that the road was fenced up on both sides; and strung along the ditch, then, on the east side and west side both, just as it is today, at the north end of the Barnaby land and the Michel Pablo land; there was quite a large head of cattle there strung along the ditch clear out of sight to the east in the brush and trees; and quite a quantity of water was coming down at that time. The ditch was the same place where it is now, and I have seen it many times since.

Cross Examination

By Mr. Simmons:

I was making this trip on the stage. I did not get out of the stage and go along the ditch to exam-

(Testimony of Jean McIntire.)

ine it. I do not know how long the ditch was. The stage crossed it. It was a large ditch coming down there full of water. That was in 1891.

JEAN McINTIRE

then was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Hershey:

Plaintiff is my mother. I am acquainted with the two eighties, the 160 acres which she now owns, in controversy here. I have known that land since 1907 when I was 14 years of age. [239] At that time I went down to that land with my father who had been asked to advance some money on this land by a man named Hitchcock who desired to purchase it. We saw Mr. Pablo to find out whether or not he wanted to sell the land. There was an irrigation ditch on the land. It was a show place on the reservation. There was a wonderful crop on the land of alsike and timothy. The crops were so high that I could not see the buckboard of the wagon.

The majority of this land will not raise crops without irrigation. Ordinary crops, such as hay and grain, oats or barley, or anything of that nature cannot be raised on this land without irrigation. It has a gravelly sub-soil.

After my father acquired this tract of land we saw Mr. Moody, the project engineer of the Flat-

(Testimony of Jean McIntire.)

head Irrigation Project and he advised my father in my presence that we had no right to irrigate the land. He said the only right the Government acknowledged was water for stock and domestic purposes only and that we could not irrigate the land without the Government's permission; it was against the law and we would be subject to prosecution, if we irrigated the land. This occurred as soon as my father got the Sheriff's deed in 1924.

We have used water on the land and irrigated it to some extent every year. There is water coming down the ditch on the east eighty and we have also used some in the west 80. The east 80 was the Barnaby land and the west 80 the Michel Pablo land. There has been water there ever since 1907.

Cross Examination

By Mr. Simmons:

I don't know the number of acres irrigated in 1907 when I went on the two eighties in question with my father. I think the crops raised at that time were alsike and timothy. I don't know how much water was used. About 1500 head of cattle were getting their water from the ditch. When my mother acquired this land Mr. Moody told us we could not irrigate. Since we have had the place we have irrigated the meadow and turned out [240] some water. About half of the Lizette Barnaby place, approximately 40 acres, that is the E½ of the NE¼ has had water from the ditch since 1924. The irrigation has only been for grazing purposes

(Testimony of Jean McIntire.)
for the meadow on those 40 acres. No crops have been raised upon the east eighty whatsoever. On the west eighty, the old Michel Pablo allotment, I would say that we have used water on possibly 20 acres. On this acreage we raised some alsike and timothy. We have a good garden there and some alfalfa.

The ditch is comparatively level. In some places it is filled with silt and is only eighteen inches to two feet wide; in other places it is probably four feet wide. The length of the ditch is approximately a mile. The ditch has been cleaned out on several occasions. We have never attempted to limit the amount of water diverted to a thousand gallons a day, which the Project Engineer told us we were entitled to divert.

BERT LISH

was called as a witness on behalf of the plaintiff and having been first duly sworn upon direct examination testified as follows:

Direct Examination

By Mr. Hershey:

I am sixty four years old. I have been irrigating lands ever since I was eleven years old. I started irrigating in the Gallatin Valley and I have irrigated lands in the Blackfoot and pretty much in the Bitter Root and on the Flathead Indian Reserva-

(Testimony of Bert Lish.)

tion. I live on a farm on the Flathead now near Post Creek. It is about 12 to 14 miles south of the lands in controversy. I am familiar with the Michel Pablo and Barnaby lands and have been out on both of those places. To properly irrigate those lands you would have to have quite a head of water, two inches to the acre, for the reason that there is just a little skim of good land on the top and the rest is mostly gravel and rocks. There is a gravel pit up there in one place, about twelve feet deep and it is rocks from the top to the bottom. [241]

Cross Examination

By Mr. Simmons:

By two inches to the acre I mean as near as I can get it around two second feet. I think I mean two second feet to the acre, eighty miner's inches. You want all the water you can get. I don't know what a miner's inch of water to the acre is. I have seen water all over this State measured and helped to measure it and I know that a certain sized weir —will carry so much. An acre foot of water isn't hardly anything. I would say that the duty of water on the McIntire land is two inches of water at the point of delivery on the land. I don't mean continuous flow during the entire year, but just the irrigation season. The irrigation season would be from about the 15th of April to about the 15th of October. The various times I have examined this land I made no examination to determine the number of acres being irrigated on either of these tracts.

(Testimony of Bert Lish.)

I only observed the lands as I was going up and down the road at the time they were building the highway.

Redirect Examination

By Mr. Hershey:

In the last two or three weeks I have been present when a demonstration was being made in measuring water. I have assisted in the placing of the weir and at that time there was measured out accurately by a weir 40 inches of water into a ditch.

ELMER E. HERSHEY

a witness on behalf of the plaintiff, was recalled and testified as follows:

I will state that taking the rules of the Agricultural College at Bozeman—I haven't got the rules here but I can produce them—I built a weir, rectangular weir, and it was a two foot weir, and I put over that two foot weir the actual amount of water for 40 inches and let it flow down a ditch that this witness and others had been using for irrigation purposes, just even 40 inches, so they could see what 40 inches was. And that is what I am trying to have this witness answer, with his experience as an irrigator. He has seen, actually seen 40 inches of water measured out in the ditch. [242]

(Testimony of Bert Lish.)

BERT LISH

a witness on behalf of the plaintiff was again recalled and testified as follows:

Redirect Examination

By Mr. Hershey:

I recall the incident related by Mr. Hershey and I observed the quantity of water flowing in the ditch. From my experience in using water in the last fifty odd years and from my observation of the quantity of water in this ditch on this place I will state from my observation as an irrigator and from what I saw demonstrated there would be required to irrigate an acre of land upon the land in question, the Pablo land, two inches at least.

Recross Examination

By Mr. Simmons:

Q. You mean two inches for the irrigation season or for the entire year?

Mr. Hershey: I object to that because that isn't the way we measure water. Beneficial use is the measure of the right and we have a right to sufficient water to irrigate that land as long as we need it.

The Court: Yes, I think so.

The two miner's inches will just run during the irrigation or crop season.

Plaintiff rests.

Thereupon the following evidence was introduced by the defendants upon their case in chief.

HENRY GERHARZ

was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Simmons:

I am the Project Engineer of the Flathead Indian Irrigation Project and have been such since November 14, 1933. I have general charge of all the Operation and Maintenance activities of the project and I have charge of the construction work that is carried on and among my duties is that of being Water Commissioner to settle any controversies between the different users of both private and project rights.

DEFENDANTS' EXHIBIT FIVE

Admitted

(Exhibit 5 is a certified copy of an official Government map, part of the Flathead Irrigation Project records, of Private Canals and Irrigated lands in part of Township 21 North, Range 20 West, Montana Principal Meridian, showing that portion of the lands and waters in controversy as well as the course of the ditches, Government and [243] private in that area. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

(Testimony of Henry Gerharz.)

Defendants offered Exhibit 6, is a photostatic copy of several official record maps showing the grants of water made by the Secretary of the Interior to private claimants, as well as the lands to be irrigated by said waters. We have the original maps here in court. The photostat enlargements were made so that they could be readily seen. I have compared the original maps with these enlargements and they are identical. The entire course of Mud Creek as is affected by the water rights in controversy can be seen on this map. The green color is put on to show lands to which the Secretary of the Interior granted water rights. All of these tracings from which this map was made are part of the official files in the Government Irrigation Office at St. Ignatius, Montana. (The witness designated by red pencil mark on this offered exhibit north, south, west and east. The course and source of Mud Creek was traced by the witness in red pencil. The witness designated with a red pencil by the figure "1" the Lizette Barnaby allotment and by the figure "2" the Michel Pablo allotment.)

DEFENDANTS' EXHIBIT SIX

Admitted

(Defendants' Exhibit 6, being a photostatic copy of several official Government record maps as described above, has been certified to the Circuit Court of Appeals as a portion of the record in this case).

(Testimony of Henry Gerharz.)

The Lizette Barnaby allotment is described as the E½ of the NE¼ of Section 14 marked in red pencil on the map as No. 1 and the Michel Pablo allotment is described as the W½ of the NE¼ of Section 14, marked in red pencil as No. 2 on the map. Mud Creek flows through the SE corner of the Lizette Barnaby allotment. Defendants' Exhibit 6 shows the course of the Pablo ditch running out of [244] Mud Creek and running down to the Michel Pablo and other tracts in that territory.

(The witness marked the course of the Pablo Ditch on defendants' exhibit 6 with a blue pencil.)

On defendants' exhibit 6 is shown the irrigable acreage of the Michel Pablo and the Lizette Barnaby tracts. The irrigable acreage as determined by the Government classification committee on the Michel Pablo tract is 60.8 acres; none on the Lizette Barnaby tract.

Cross Examination

By Elmer E. Hershey:

Referring to defendants' Exhibit 6 the 60.8 acres designated thereon as being irrigable acreage on the Michel Pablo tract was placed on the map several days ago. It was taken from our records of the irrigable acreage for each 40 acre tract in the Flathead Irrigation District. These records were made up many years ago. We have them here. They were made up since Michel Pablo settled on the land and it was allotted to him. No irrigable acreage is shown on the Lizette Barnaby land. I have been on the

(Testimony of Henry Gerharz.)

Lizette Barnaby land and I have never seen a ditch across that land nor have I observed that the land has been plowed. The classification records undoubtedly show that they were made since the lands were allotted to these Indians and since patents were issued to them.

ROBERT S. STOCKTON

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

During the year 1907 I was employed by the Government as Project Engineer in the construction of the Huntley Project near Billings, Montana. During the summer of that year I was ordered by my superior, H. N. Savage, Supervising Engineer, to make a reconnaissance and preliminary survey on the Flathead Indian Reservation to outline the possible development for irrigation, power, and other conservation of natural resources of the Flathead Reservation. In July, 1907 I shipped an outfit to Ravalli, Montana, organized two field parties and during the summer and up to the [245] middle of September of that year we made plane table, level, and stadia surveys covering the lands in the Mission and Jocko Valleys and some investigation on

(Testimony of Robert S. Stockton.)
the Little Bitter Root and took all the information in the field that we thought necessary in order to prepare a report to show the best possible distribution of use that could be made of the natural resources of the lands on the Reservation. I have a copy here of the report that was submitted to the Secretary of the Interior in Washington.

"Mr. Hersey: The same objection that I made heretofore. At the present time they cannot have any evidentiary value to the appropriation of water made in 1891 or prior thereto, being too late a date, the rights had attached to this land and the government itself couldn't take away any of those rights or destroy them in any way.

The Court: Well we will admit them under your theory of the case.

Mr. Hershey: Now that objection I think ought to go to all of these exhibits so I won't have to repeat it.

The Court: Yes, the other exhibits that are admitted; they may be admitted, and these two.

DEFENDANTS' EXHIBIT SEVEN

Admitted

(Defendants' Exhibit Seven is a letter addressed to Mr. Robert S. Stockton, Irrigation Manager, United States Reclamation Service, Glendive, Mon-

(Testimony of Robert S. Stockton.)

tana, dated December 28, 1908, and signed by Charles P. Williams, an engineer in the United States Reclamation Service. This exhibit has been certified to the Circuit Court of Appeals as a part of the original record in this case.)

DEFENDANTS' EXHIBIT EIGHT

Admitted

(Defendants' Exhibit Eight is a report of Mr. R. S. Stockton, dated November 12, 1907 to H. N. Savage, Supervising Engineer, U. S. Reclamation Service covering the subjects testified to by Mr. Stockton. This exhibit has been certified to the Circuit Court of Appeals as a part of the original record in this case.)

DEFENDANTS' EXHIBIT EIGHT (a)

Admitted

(Folded and placed in the back of defendants' Exhibit 8, but not fastened thereto is a large blueprint map which bears the title "Flathead Project, Montana. Map of Lands and Surveys," dated November 12, 1907 with the names Robert S. Stockton, Project Engineer and H. N. Savage, Supervising Engineer. This exhibit, the blueprint map re-

(Testimony of Robert S. Stockton.)

ferred to, has been certified to the Circuit Court of Appeals as a part of the original record in this case.) [246]

In my investigations and work on the Flathead Indian Reservation in 1907 I laid out the plans of the Flathead Irrigation Project System in a general way. I laid out a system of canals and laterals, estimated the irrigable acreage that could probably be obtained, made a rough estimate of costs for the construction of the main canals of the irrigation system proposed, but not of the distributing system to the individual farmers. Our idea was that the water in the various small streams and the water in the Flathead River would be available for the irrigation of the land and for the development of power; that the water and the land was in the hands of the Government and after my instructions from Mr. Savage and after talks with Senator Dixon and in considering the act opening the reservation our purpose was to conserve in a permanent way the very large natural resources of this region.

The Washington Office had decided to have the Reclamation Service construct the project and the Indian Service and Reclamation Service were cooperating at that time.

I remember the water across the road at the Pablo Ranch, but I have no personal knowledge of this particular right. I did notice a large number

(Testimony of Robert S. Stockton.)

of buffalo grazing there. I made a study of Mud Creek and of the waters flowing thereon for use in the project system. It was carefully surveyed and we had a lateral system planned taking water out of Mud Creek as well as out of Mission Creek and Post Creeks. The idea was to take up all the water available and provide as much storage as possible so as to get the greatest possible useful development of the lands of the Flathead Reservation.

I was back on the reservation in October, 1908 and I was advised by the engineers in charge that my original plan of taking water out of these different little streams had been modified by running a main feeder canal designated as the Pablo Feeder Canal parallel to the Mission Mountains and picking up all of this water [247] into one main feeder canal. The Pablo Feeder Canal is correctly designated on defendants' exhibit 6.

(The witness marked the course of the Pablo Feeder Canal in red pencil on defendants' exhibit 6 along the dashed line on the map which designates said canal.)

The Reclamation Service subsequently turned over the operation, management and construction of the Flathead Irrigation Project to the United States Indian Irrigation Service.

The work done by me as a Reclamation Service engineer was in cooperation with the Indian Service.

(Testimony of Robert S. Stockton.)

Cross Examination

By Mr. Hershey:

The Pablo Feeder Canal designated on defendants' Exhibit 6 was above the Pablo land. I had no instructions not to interfere with private water rights. My instructions were to find the best way to use all of the water available on that project without regard to any other rights that might have existed.

GUY L. SPERRY

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

I am an assistant engineer in the Indian Irrigation Service. Have been such since 1924. Prior to that time I was with the Reclamation Service from 1909 to 1917. I was surveying in 1909, junior engineer in 1910, and was on the engineering force until 1917.

DEFENDANTS' EXHIBIT NINE

Admitted

(Defendants' Exhibit 9 is a lithographed map of the Flathead Irrigation Project, Montana, showing

(Testimony of Guy L. Sperry.)

the source and course of Mud Creek, the Pablo Feeder Canal, and the major portion of the Flathead Irrigation Project System. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.) [248]

In 1910 I located the Pablo Feeder Canal on the north end of the project, that is, the part of the feeder canal that crossed Mud Creek and that lay in the northeast of Pablo. The construction of the canal was begun on the north end and worked back south, in other words, work was begun at the lower end of the feeder canal and continued upstream so that we could use the lower end of it before the entire canal was completed. In other words, the branches of Crow Creek and Mud Creek and Post Creek could be picked up as the canal crossed these creeks.

(The witness designated the places on the map crossed by Mud Creek with X's in pencil.)

The Pablo Feeder Canal was built for the purpose of picking up all of the waters along the base of the Mission Range. It runs pretty much parallel to the Mission Range Mountains. The water is carried north by the canal and may be used on the Pablo Division and put in the Pablo Reservoir and used from there to water lands lying in south and west of the Pablo Reservoir in the Pablo Division and in the Round Butte Division. There are ample lands to use all of the water that can be picked up and even then there is a shortage of water. All of

(Testimony of Guy L. Sperry.)

the available water is used. Since 1913 all of the available waters of Mud Creek have been used on land lying under the Flathead Irrigation Project system. All of the waters of Mud Creek are being used up to this time, except that which we have to let go by in order to supply certain private rights that are recognized by the United States.

Defendants' Exhibit 5, which shows the McIntire lands involved in this case, is a print from the original map made from survey by me in 1910. It covers the Lizette Barnaby and the Michel Pablo allotments now owned by the plaintiff, Agnes McIntire. This map shows that in 1910 there was no irrigation done on the Lizette Barnaby unit. It also shows that on the Michel Pablo unit in the northwest quarter of the NE¼ of Section 14, that is, the north half of the [249] eighty there were 13 acres irrigated poorly; in the SW¼ of the NE¼ there were five acres poorly irrigated. By poorly irrigated I mean that it was just partially irrigated. It was not irrigated sufficiently to produce a good crop. It did have some evidence of irrigation. My notes show that the timothy was poor. The data for the preparation of this map and the drafting of the same was secured by means of a transit and stadia survey made in 1910 by myself and one F. E. White, Rodman. The ditch was located by means of the transit and the stadia reading distances and angles, and tied in to a General Land Office corner, that is, a Land Office corner. On the same day that the sur-

(Testimony of Guy L. Sperry.)

vey was made I also gauged the amount of water in the ditch. I found there was .95 of a second foot flowing on that day. That was June 28, 1910. That will be thirty-eight miner's inches in the State of Montana. The ditch on that day was approximately half full. It would have a capacity of a two second foot ditch or 80 miner's inches.

In 1929 or 1930 I was on these lands, looking over them, and classifying the lands and classifying the irrigable areas. I never saw any evidence of irrigation on the Lizette Barnaby tract. A part of the Michel Pablo tract in the south forty near the north edge of the south forty is sub-irrigated.

The soil on the Barnaby eighty is very gravelly along the road. It lies along the main highway and the State highway have a gravel pit there. It has a shallow top soil, which is probably pretty fair soil. There is quite a little sand in some places in the eighty and quite a lot of gravel. The west eighty, that is, the Michel Pablo eighty, is a better eighty and is not so gravelly.

The duty of water would be the amount of water that would be required per acre to raise a good crop. The duty of water on the Lizette Barnaby land would take probably five or six acre feet per acre, parts of it probably not so much. The Michel Pablo land between two and three acre feet per acre, that is, on the gravelly portion, other parts of it possibly a foot and a half. The sub- [250] irrigated portions of the Michel Pablo allotment would not require any water.

(Testimony of Guy L. Sperry.)

Cross Examination

By Mr. Hershey:

The Pablo Feeder Canal carries water toward the Pablo Reservoir to irrigated lands that never had any water on them before the canal was built or before the project was being built. In 1913 these lands began to be irrigated, possibly before that. Water was taken from Mud Creek through the feeder canal for the irrigation of these new lands in about 1913. Reducing the acre feet required to irrigate the Barnaby tract to second feet would be three second feet. The Michel Pablo land would require about half that much.

In June, 1910 Michel Pablo was occupying the land at the time I made the survey. The ditch was in fair repair to such an extent that it was carrying a foot of water and was, however, full on that day.

Redirect Examination

By Mr. Pope:

The Pablo Feeder Canal is a very significant factor in the Flathead Irrigation Project system, inasmuch as any creeks or streams crossed by this canal can be picked up and carried to a storage reservoir and there stored and distributed from this reservoir for thousands of acres of land that lie in the project; or can either be stored there and run down the distributary canals and put on the land within the project has proposed to and is irrigating; and for

(Testimony of Guy L. Sperry.)

this reason it is a very significant factor; otherwise these waters would go on in the streams and be lost and could not be recovered. The loss of the waters from Mud Creek would affect all the lands in the Mission Valley Project, which includes something over a hundred thousand acres of irrigable lands; and the waters of Mud Creek can be picked up and carried and stored in the Pablo Reservoir, and this, of course, obviates the necessity of running other waters farther south. [251]

Recross Examination

By Mr. Hershey:

The water from the Pablo Reservoir can be used to irrigate the Pablo and Barnaby Tracts. There is a ditch at the northwest corner of the Michel Pablo eighty, the culvert across the road has been destroyed and water could not be placed upon the allotment until this is done. This work, however, would require not to exceed 48 hours to put water on this allotment and possibly not more than 24. No water has ever been used from that source on these lands. About sixty or sixty-one acres is irrigable on the Michel Pablo allotment, that is, land considered as irrigable by our land classification. This water which would be delivered through this ditch and culvert is not private water.

(Testimony of Guy L. Sperry.)

Redirect Examination

By Mr. Simmons:

These lands I spoke of, which were classified as irrigable, were classified by Land Classification Board appointed by the authority of the Commissioner of Indian Affairs to make a survey and go over the lands of the entire project, such as were within the district, and classify these lands with regard to whether they were irrigable or non-irrigable, or whether they had lands in them that could never be irrigated. This Board inspected the Michel Pablo allotment. They found 60.77 acres of irrigable lands there. No classification of the Lizette Barnaby tract was made for the reason that the land on this allotment was considered by the Board as being quite gravelly and too gravelly and sandy to irrigate, and in the second place, it is not in the District. If the plaintiff desired to secure water from the Flathead Irrigation Project System for the irrigation of the irrigable portions of her lands she could put in a request for water for this particular tract, allowing a short time to put the road culvert across the road, and make what little ditch would be necessary to put the water down on the land. No demand has ever been made of me and to my knowledge of any project officials for the waters of the project system by the plaintiff for the irrigation of this land. [252]

(Testimony of Guy L. Sperry.)

Recross Examination

By Mr. Hershey:

This land classification was made in the fall of 1929 and the spring of 1930. The land was patented many years before that. You could get water on the Michel Pablo land from the Flathead Irrigation Project System by making application for it and paying for it. The east 80, that is, the Barnaby tract, is not in the irrigation district.

W. S. HANNA

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

I am the Supervising Engineer of the United States Indian Irrigation Service and have supervision over the Flathead Irrigation Project. I have made repeated trips to the Flathead Irrigation Project since 1914. In 1924 the project was turned over from the control of the Reclamation Service to the Indian Service. Since that date it has been directly under the jurisdiction of my office. The Pablo Feeder Canal was completed after 1914. The bulk of the lands benefitted by the waters of Mud Creek lie under the Flathead Irrigation District. However, the waters of Mud Creek are a benefit to the whole Mission Valley Division.

(Testimony of W. S. Hanna.)

DEFENDANTS' EXHIBIT TEN
Admitted

(Defendants' Exhibit 10 is a portion of the annual costs statement and general irrigation data statement that is prepared annually for submission to Congress by the Chief Engineer's Office in Washington. It shows the cost of construction of the Flathead Irrigation Project to June 30, 1936. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

The cost to June 30, 1936 of the Flathead Irrigation Project as shown on the exhibit is $7,499,105.85. This is arrived at by adding the column which shows preliminary surveys and construction and another column which shows administration expense. [253]

Direct Examination

By Mr. Pope:

The Flathead Project was originally made in three divisions, the Mission Valley Division, the Jocko Division, and the Camas Division. What we refer to as the Mission Valley Division includes the greater portion of the Flathead Irrigation District and all of the Mission Irrigation District. The greater portion of this division is composed of lands which are in the Flathead Irrigation District, one of the defendants in this case. There are in the

(Testimony of Henry Gerharz.)
neighborhood of 80,000 acres of irrigable land within the Mission Valley Division and also within the Flathead Irrigation Districts. The waters of Mud Creek affect approximately 80,000 acres of land within the Flathead Irrigation District.

HENRY GERHARZ,

a witness for the defendants was recalled and testified as follows:

Redirect Examination

By Mr. Simmons:

DEFENDANTS' EXHIBIT ELEVEN
Admitted

(This is a certified copy of the official file copy of the instrument referred to, as appears in the records of the Office of Indian Affairs, Washington, D. C.)

Irrigation
23254-34
50537-18 Copy
WHF Jun 8 1934
Mr. Henry Gerharz,
Project Engineer.

Dear Mr. Gerharz:

Responding to your letter of May 8 referring to the appointment of a Water Commissioner to supervise the distribution of water flowing within the

(Testimony of Henry Gerharz.)
boundaries of the Flathead Reservation in Montana—

The report of the Commission appointed for the purpose of determining old water rights on the Flathead Indian Reservation in Montana, which was approved by the Department on November 25, 1921, included the following provision: [254]

> "The Secretary of the Interior shall appoint the engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch."

Pursuant thereto, the then Project Engineer, Mr. C. J. Moody, was specifically appointed under date of August 10, 1922 by the Department to act as Water Commissioner on this reservation.

As you state, the Commission itself was discontinued on August 7, 1929, but this did not discontinue the office of the Water Commissioner whose duties are to administer the approved findings of the Commission.

In view of the fact that the Water Commissioner must effect the division of the waters of the reserva-

(Testimony of Henry Gerharz.)

tion between private parties and also between them and the Government irrigation project, it is felt that the Project Engineer is in the best position to perform these duties. Your request to be relieved of the responsibilities in this connection is, therefore, denied and you are hereby specifically appointed as Water Commissioner to do the things contemplated by the Commission's report.

These private water right matters were involved in the so-called "Moody Cases." The Circuit Court of Appeals for the Ninth Circuit reversed the decree of the District Court and remanded the cases with directions to dismiss them for want of necessary parties, unless the plaintiffs, within a reasonable time amended their complaint so as to bring in such necessary parties. Subsequently, in mandamus proceedings the Circuit Court granted our petition for a writ of mandamus against the District Court from proceedings inconsistent with the order of the Circuit Court. Owing to the need to protect the several private water users and the Flathead Project in the use of water, it is necessary that some one perform this work, and the Project [255] Engineer is the logical person to perform these services.

In case of interference by the water users with the distribution of the water, you will present the facts to District Counsel Simmons for his consideration and action.

Sincerely yours,

(Sgd) WILLIAM ZIMMERMAN, JR.

Assistant Commissioner.

(Testimony of Henry Gerharz.)

Approved: Jun 12 1934.

(Sgd) OSCAR L. CHAPMAN

Assistant Secretary.

Copy to Supervising Engineer Hanna.

Copy to District Counsel Simmons.

DEFENDANTS' EXHIBIT TWELVE

Admitted

(Defendant's Exhibit Twelve is a photostat copy of the original repayment contract between the Flathead Irrigation District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT THIRTEEN

Admitted

(Defendants' Exhibit Thirteen is a photostat copy of the first supplemental contract between the Flathead Irrigation District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT FOURTEEN

Admitted

(Defendants' Exhibit Fourteen is a photostat copy of the second supplemental contract between the Flathead Irrigation District and the United

(Testimony of Henry Gerharz.)
States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.) [256]

DEFENDANTS' EXHIBIT FIFTEEN
Admitted

(Defendants' Exhibit Fifteen is a photostat copy of the third supplemental contract between the Flathead Irrigation District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT SIXTEEN
Admitted

(Defendants' Exhibit Sixteen is a certified copy of the order of the District Court of the Fourth Judicial District of the State of Montana in and for the County of Lake in the matter of the formation of the Flathead Irrigation District. In this order there appears the following description of lands included in the Flathead Irrigation District: The W½ of the NE¼ of Section 14. The township and range being the same as the Michel Pablo Tract involved in this case, which shows eighty acres of the lands involved here as being all included in the Flathead Irrigation District and subject to the terms of the Flathead Repayment Contract entered

(Testimony of Henry Gerharz.)
into between the District and the United States. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

DEFENDANTS' EXHIBIT SEVENTEEN
Admitted

(This is a certified copy of the original instrument on file in the Office of Indian Affairs, Washington, D. C.)

Department of the Interior
United States Indian Service
Flathead Agency

Dixon, Montana.
December 10, 1919.

The Commissioner of Indian Affairs,
Washington, D. C.

Sir: [257]

The first findings on water rights on the Flathead Indian Reservation were submitted by a committee appointed by the Commissioner of Indian Affairs, consisting of Fred C. Morgan, Superintendent of Flathead Indian School, Foster Towle, Assistant Engineer, U. S. Reclamation Service, and Alphonse Clairmont, a member of the Flathead Tribe. This committee made a report on the water rights of the Jocko Drainage Basin which was submitted on January 15, 1914.

(Testimony of Henry Gerharz.)

On July 21, 1917, a committee composed of Fred C. Morgan, Superintendent of the Flathead Indian School, F. T. Crowe, Project Manager, U. S. Reclamation Service, and Alphonse Clairmont, a member of the Flathead Tribe, made a report on the water rights of Garden Creek.

Under date of September 17, 1918, Theodore Sharp was appointed to succeed Fred C. Morgan on this Committee and on March 26, 1919, the appointment of A. P. Smyth, Assistant Engineer, U. S. Reclamation Service, to succeed Foster Towle was approved by your office.

The following are the principles observed in making the findings of the Committee last mentioned above, together with recommendation with regard to the taking over of old ditches.

The Committee met on April 28, 1919, at St. Ignatius, Montana, and organized by electing Theodore Sharp as Chairman. All persons owning or occupying land upon or tributary to these streams were notified by published notices in local papers and by posting notices in local postoffices that they might present their claims, if any, in person or in writing to the use of waters of the Flathead Indian Reservation.

Examination of the streams, the works diverting water therefrom and the irrigated lands were made by the Committee in person and an engineer employee of the U. S. Reclamation Service made a map on a scale of 1000 feet to the inch, showing the

(Testimony of Henry Gerharz.)

course of said streams, the location of the ditch or canal diverting water therefrom, and [258] the legal sub-division of lands, which have been irrigated or are susceptible of irrigation from canals already constructed which maps are attached and made a part hereof.

The Committee is required to determine the status of all water right claims conflicting with the United States and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and operation and maintenance cost.

A previous report has been submitted by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and Foster Towle for the lands in Jocko Valley; and by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and F. T. Crowe for lands tributary to Garden Creek.

The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosperity a reservation of Indian land carries with it an implied reservation of sufficient water, to serve the irrigable land within such reservation, of all natural streams, springs, lakes or other collections of still water within the boundaries of the said tract.

The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the al-

(Testimony of Henry Gerharz.)
lotted lands and the unallotted irrigable lands of the Reservation, and were, in substance, appropriated to these lands when the Reservation was established, and its control must vest in the United States Government.

Section 9 of the Act of May 29, 1908, authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the provision for the irrigation of the allotted lands and the unallotted irrigable lands to be disposed of under the Act of April 23, 1904. [259]

A right to the use of water of the reservation must be acquired by the beneficial application of water under such rules and regulations as the Secretary of the Interior may make.

In order that equity shall be done to all the various interests involved it is recommended that water rights be determined under the following regulations:

Beneficial use prior to the appropriation by the United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation a limit of two acre feet per acre per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land and no right for the use of water for irrigation can be acquired independent of its use upon

(Testimony of Henry Gerharz.)

and attached to definite tracts of land and that water rights cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch. [260]

The Committee recommends that wherever practicable the United States refrain from destroying private ditches; that the allottee or his successor in

(Testimony of Henry Gerharz.)

interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a Government ditch he should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction for that acreage that is determined to have a valid water right; but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment. If it is determined that it is to the best interest of the United States to destroy these ditches then said individual or corporation should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction with no charges for operation and maintenance for that portion of his allotment which is determined to have a valid water right.

Michel Pablo
Allotment No. 1148
W½ NE¼ Sec. 14, T. 21 N., R. 20 W.

The Committee, on June 3, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Michel Pablo, being allotment No. 1148, comprising the W½ NE¼ Sec. 14, T. 21 N., R. 20 W., and testimony was taken on November 19, 1913, and June 3, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1109,

(Testimony of Henry Gerharz.)

made by an engineer employee of the U. S. Reclamation Service, after a survey by transit and stadia, it is determined that Michel Pablo in 1891 constructed a ditch diverting water from Mud Creek at a point on the right bank in the NE¼ NE¼ NW¼ Sec. 13, T. 21 N., R. 20 W., for the purpose of conveying water upon portions of this allotment; that this ditch has not been used for irrigation for the past ten years but has been [261] used continuously for domestic and stock purposes; that said allotment is determined to have a valid and subsisting water right from Mud Creek to the extent of 1,000 gallons per day for domestic and stock use and that no other water right of any kind is appurtenant to this allotment.

This report covers all streams in the Mission, Little Bitter Root, Camas and Lower Jocko Valleys, and includes the following streams and their tributaries:

Sabine Creek.
Dry Creek near St. Ignatius.
Mission Creek.
Ashley Creek.
South Fork of Ashley or Dry Creek.
Poison Oak Creek.
Post Creek.
Marsh Creek.
Crow Creek.
Spring Creek near Ronan.
Mud Creek.
Ashley Creek near Bisson Creek.
Dubay Creek.

(Testimony of Henry Gerharz.)

Minesinger Creek.
Bisson Creek.
Meadow Creek.
Moss Creek.
Big Creek at Polson.
Dayton Creek.
Big Creek at Eudora.
Sullivan Creek.
Little Bitter Root River.
Dry Fork Creek.
Warm Springs Creek.
Markle Creek.
Cottonwood Creek.
Sweetwater Creek.
Michel Creek.
Camas Creek.
Revais Creek.
Selow Creek.
Jocko Creek.
Ashley Creek near Mud Creek.
Courville Creek.

The only water rights to the use of the water of these streams are those hereinbefore delineated.

Filings are continually being made in Sanders, Missoula and Flathead Counties claiming rights to the use of the waters of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted [262] lands and the unallotted irrigable lands as approved by the Secretary

(Testimony of Henry Gerharz.)

of the Interior and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units.

Very respectfully,

(Sgd) THEODORE SHARP,
Chairman, Supt. & S. D. A.
Flathead Agency

(Sgd) ALPHONSE CLAIRMONT
Representative elected by the Indian Council and member of the Flathead Tribe.

(Sgd) A. P. SMYTH
Assistant Engineer, U. S. Reclamation Service.

DEFENDANTS' EXHIBIT EIGHTEEN
Admitted

(This is a certified copy from the files and records of the Office of Indian Affairs, Washington, D. C.)

Department of the Interior
United States Indian Service
Flathead Agency
Dixon, Montana.

December 10, 1919.

The Commissioner of Indian Affairs,
Washington, D. C.

Sir:

(The contents of this letter or report, down to the description of the individual rights, are exactly

(Testimony of Henry Gerharz.)
the same as the contents of the report contained in Defendants' Exhibit 17, immediately preceding this page, and are not therefore again copied in full at this point, but in lieu thereof reference is made to line 1, page 30 of this statement of the evidence and from there to and including line 17 on page 33 of the record, for the exact contents of this part of this exhibit 18.)

Alexander Sloane
Allotment No. 1186
NE¼SW¼, W¾ NW¼SE¼ & E¼NW¼ SW¼ Sec. 34, T. 21 N., R. 20 W. [263]

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Alexander Sloane, being Allotment No. 1186, comprising the NE¼SW¼, W¾ NW¼SE¼ and E¼NW¼ SW¼ Sec. 34, T. 21 N., R. 20 W., and testimony was taken on November 19, 1913.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1122, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that the predecessor in interest of the allottee in 1901 constructed a ditch diverting water from a branch of Mud Creek in Sec. 27, T. 21 N., R. 20 W., but that said ditch has not been used for ten years and therefore is to be considered as

abandoned; that said allotment is determined to have no water right from any source.

Office of Indian Affairs
Received Jul 27 1936—9090

Hattie Rose Sloane
Allotment No. 1182
NE¼NW¼, W¼NE¼NW¼ & E¼NW¼ NW¼ Sec. 34, T. 21 N., R. 20 W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Hattie Rose Sloane, being Allotment No. 1182, comprising the NE¼NW¼, W¼NE¼NW¼ & E¼NW¼ NW¼ Sec. 34, T. 21 N., R. 20 W., and testimony was taken on November 19, 1913.

From personal investigation on the ground, testimony taken, from facts shown on Plat F-1122, made by engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that the predecessor in interest of the allottee in 1901 constructed a ditch diverting water from a branch of Mud Creek in Sec. 27, T. 21 N., R. 20 W., but that said ditch has not been used for ten years and therefore is to be considered as abandoned; that said allotment is determined to have no water right from any source.

Alex Pablo
Allotment No. 1152
N½NW¼ Sec. 14, T. 21 N., R. 20 W. [264]

The Committee, on June 3, 1919, made an ex-

(Testimony of Henry Gerharz.)

amination in the field of the irrigation system and water rights appurtenant to the lands of Alex Pablo, being Allotment No. 1152, comprising the N½NW¼ Sec. 14, T. 21 N., R. 20 W.; and testimony was taken on November 19, 1913, and June 3, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1109, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Michel Pablo in 1891 constructed a ditch diverting water from Mud Creek at a point on the right bank in the NE¼NE¼NW¼ Sec. 13, T. 21 N., R. 20 W., for the purpose of conveying water upon portions of this allotment; that said ditch has been used continuously since said date for domestic and stock purposes but has been abandoned as regards irrigation for the past ten years; that said allotment is determined to have a valid and subsisting water right from Mud Creek to the extent of 1,000 gallons per day; that no other water right of any kind is appurtenant to this allotment.

Victor Clairmont
Allotment No. 945.
NW¼NE¼ & NE¼NW¼ Sec. 18, 21, N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Victor

(Testimony of Henry Gerharz.)
Clairmont, being Allotment No. 945, comprising the NW¼NE¼ & NE¼NW¼ Sec. 18, T. 21 N., R. 19 W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 26, made by an engineer employee of the U. S. Reclamation Service, after a survey by transit and stadia it is determined that Alphonse Clairmont, the father of the allottee, in 1906 constructed a ditch diverting water from Mud Creek at a point on the left bank in NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon [265] portions of this allotment; that since said date there have been irrigated 60 acres of said allotment; that said 60 acres hereinbefore described are determined to have a valid and subsisting water right from Mud Creek to the extent of 2 acre feet per acre per annum or a total of 120 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)
Henry Clairmont
Allotment No. 946
SE¼NE¼ Sec. 7, T. N., R. W.
SW¼SW¼ Sec. 6, T. 21 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Henry Clairmont being Allotment No. 946, comprising the

(Testimony of Henry Gerharz.)
SE¼NE¼ Sec. 7, T..... N., R..... W., and SW¼ SW¼ Sec. 5, T. 21 N., R. 19 W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 27, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud and Ashley Creeks and diverting on the left bank of Mud Creek in SE¼NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1906 and prior to 1915 the only area irrigated has been 13.8 acres in SE¼NE¼ Sec. 7, T. 21 N., R. 19 W.; that said 13.8 acres hereinbefore described are determined to have a valid and subsisting water right from Mud and Ashley Creeks to the extent of 2 acre feet per acre per annum or a total of 27.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)
Florence Clairmont
Allotment No. 948
W½SE¼ Sec. 7, T. 21 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to [266] the lands of Florence Clairmont being Allotment No. 948, com-

(Testimony of Henry Gerharz.)

prising the W½SE¼ Sec. 7, T. 21 N., R. 19 W., and Sec....., T. .....N., R..... W., and testimony was taken on November 18, 1913 and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 27, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud and Ashley Creeks and heading on the left bank of Mud Creek in SE¼NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 and prior to 1915 the only land irrigated in this allotment has been 13.7 acres in SW¼SE¼ Sec. 7, T. 21 N., R. 19 W.; that said 13.7 acres hereinbefore described are determined to have a valid and subsisting water right from Mud & Ashley Creeks to the extent of 2 acre feet per acre per annum or a total of 27.4 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Alphonse Clairmont
Allotment No. 942
W½NW¼ Sec. 8, T. 21 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Alphonse Clairmont being Allotment No. 942, comprising the W½NW¼ Sec. 8, T. 21 N., R. 19 W., and Sec.

(Testimony of Henry Gerharz.)

T. N., R. W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 27, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that portions of this allotment were prior to 1906 irrigated from the Joseph Clairmont ditch from Mud Creek and that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud Creek at a point on the left bank in NW¼NW¼ Sec. 5, [267] T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since said date there have been irrigated 65 acres of said allotment; that said 65 acres hereinbefore described are determined to have a valid and subsisting water right from Mud Creek to the extent of 2 acre feet per acre per annum or a total of 130 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)

Alice Clairmont

Allotment No. 944

SW¼NE¼ and SE¼NW¼ Sec. 18, T. 21 N., R. 19 W.

The Commitee, on June 6, 1919, made an examination in the field of the water rights and irrigation system appurtenant to the lands of Alice Clairmont, being Allotment No. 944, comprising the

(Testimony of Henry Gerharz.)

SW¼NE¼ and SE¼NW¼ Sec. 18, T. 21 N., R. 19 W., and testimony was taken on November 18, 1913, and June 6, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 26, made by an engineer employee of the U. S. Reclamation Service, after a survey by transit and stadia, it is determined that Alphonse Clairmont in 1906 constructed a ditch diverting water from Mud Creek at a point on the left bank in NW¼NW¼ Sec. 5, T. 21 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 19.6 acres in SW¼NE¼ Sec. 18, T. 21 N., R. 19 W.; that said 19.6 acres are determined to have a valid and subsisting water right from Mud Creek to the extent of 2 acre feet per acre per annum or a total of 39.2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Copy)

Rose Ashley

Allotment No. 1076

N½NE¼ Sec. 32, T. 22 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant of the lands of Rose Ashley, being Allotment No. 1076, comprising the [268] N½NE¼ Sec. 32, T. 22 N., R. 19 W., and testimony was taken on November 20, 1913.

(Testimony of Henry Gerharz.)

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 29, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that water from a small stream in SW¼SE¼NE¼ Sec. 28, T. 22 N., R. 19 W., has since 1895 been used for domestic and stock purposes on this allotment and that said allotment is determined to have a valid and subsisting water right from unnamed stream in Sec. 28, T. 22 N., R. 19 W., to the extent of 1,000 gallons per day for domestic and stock purposes.

Henry Ashley
Allotment No. 1029
S½ SE¼ Sec. 29, T. 22 N., R. 19 W.

The Committee, on June 6, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Henry Ashley, being Allotment No. 1979, comprising the S½ SE¼ Sec. 29, T. 22 N., R. 19 W., and testimony was taken on November 20, 1913.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 29, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that water from an unnamed stream in SW¼SE¼NE¼ Sec. 28, T. 22 N., R. 19 W., has, since, 1895, been used for domestic and stock purposes on this allotment; that said allotment is determined to have a valid and subsisting

(Testimony of Henry Gerharz.)
water right from unnamed stream in Sec. 28, T. 22 N., R. 19 W., to the extent of 1,000 gallons per day for domestic and stock purposes; that no other water right from any source is appurtenant to this allotment.

This report covers all streams in the Mission, Little Bitter Root, Camas and Lower Jocko Valleys, and includes the following streams and their tributaries: [269]

Sabine Creek.
Dry Creek near St. Ignatius.
Mission Creek.
Ashley Creek.
South Fork of Ashley or Dry Creek.
Poison Oak Creek.
Post Creek.
Marsh Creek.
Crow Creek.
Spring Creek near Ronan.
Mud Creek.
Ashley Creek near Mud Creek.
Courville Creek.
Big Creek near Bisson Creek.
Dubay Creek.
Minesinger Creek.
Bisson Creek.
Meadow Creek.
Moss Creek.
Big Creek at Polson.
Dayton Creek.
Big Creek at Fudora.

(Testimony of Henry Gerharz.)

Sullivan Creek.
Little Bitter Root River.
Dry Fork Creek.
Warm Springs Creek.
Markle Creek.
Cottonwood Creek.
Sweetwater Creek.
Michel Creek.
Camas Creek.
Revais Creek.
Selow Creek.
Jocko River.

The only water rights to the use of the water of these streams are those hereinbefore delineated.

Filings are continually being made in Sanders, Missoula and Flathead Counties claiming rights to the use of the waters of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units.

Very respectfully,
(Sgd) THEODORE SHARP,
Chairman, Supt. & S. D. A.,
Flathead Agency.

(Testimony of Henry Gerharz.)

(Sgd) ALPHONSE CLAIRMONT
Representative elected by the Indian Council and Member of the Flathead Tribe.

(Sgd) A. P. SMYTH
Assistant Engineer, U. S. Reclamation Service. [270]

DEFENDANTS EXHIBIT NINETEEN
Admitted

(This is a certified copy taken from the files and records of the Office of Indian Affairs, Washington, D. C., and certified as such.)

29928-21

United States
Department of the Interior
Office of Indian Affairs
Washington

Copy
May 24 1921

The Honorable
The Secretary of the Interior
(Through Director, Reclamation Service).

My dear Mr. Secretary:

The Commission, comprising the Superintendent of the Flathead Reservation, the Reclamation Service Project Manager, and an Indian selected by the Flathead Tribe, appointed for the purpose of deter-

(Testimony of Henry Gerharz.)

mining old water rights on the Flathead Indian Reservation, Montana, has reported with respect to existing rights of all persons owning or occupying land upon streams within the Flathead Indian Reservation. This report also covers those lands held by eleemosynary societies at St. Ignatius and white owners who have been adopted into the tribes. After having conducted surveys and investigations on the ground and considered testimony brought out at a hearing called for the purpose, the Commission submits its report, consisting of four volumes, as follows:

(Here follows a quotation, word for word, of the report of the Committee referred to, which is included in Defendants' Exhibit 17, herein, beginning on line 1 of page 30 of this statement and to and including line 17 on page 33 of this statement, where the quotation ends, and for this reason it is not again copied in full at this point but reference is made to said Exhibit 17 and to line 17, page 33 of this statement.)

It will be noted that the Commission recommends that in those cases where it is deemed advisable for the United States to destroy private ditches and construct a new ditch, the owner or owners of said old ditch shall be entitled to a paid-up water right to the extent of 100% of the cost of construction, with no charges for [271] operation and maintenance, for that part of his allotment which is determined to have a valid water right. While it is believed to be equitable and just in such cases to grant

(Testimony of Henry Gerharz.)

the Indian what is known as a paid-up water right, nevertheless it is believed that such land should not be granted paid-up operation and maintenance in perpetuity. Such charges are paid annually as a general rule and to concur in this respect with the Commission's report might in the future cause considerable dissatisfaction among various land owners.

It is therefore respectfully recommended that the report submitted herewith be approved with a slight modification relative to the matter of paid-up operation and maintenance charges referred to above, to the effect that the Secretary of the Interior in all such cases shall determine whether or not such persons shall in addition to being granted a full paid-up water right, also be granted free operation and maintenance charges.

Cordially yours,
(Sgd.) CHAS. H. BURKE
Commissioner

I concur: May 24, 1921.
(Sgd.) MORRIS BIEN
Acting Director
Reclamation Service

Approved: Nov. 25, 1921.
(Sgd.) F. M. GOODWIN
Assistant Secretary

(Testimony of Henry Gerharz.)

DEFENDANTS' EXHIBITS 20, 21, 22, 23, 24, 25 AND 26 ADMITTED

(Defendants' Exhibits are certified copies of records taken from the Department of Reclamation in Washington showing notices of appropriation of the waters of Mud Creek by the United States of America, made in pursuance to the Reclamation Act and in pursuance to the laws of the State of Montana applicable thereto. It is charged in the Bill of Complaint that these filings were made as formal notice to all landowners and settlers along Mud Creek; that these [272] waters had been reserved by the United States for beneficial uses upon the lands of the reservation. They are not relied upon to establish any date of priority. These exhibits have been certified to the Circuit Court of Appeals as a portion of the record in this case.)

(Testimony of Henry Gerharz Continued.)

As to that portion of the Michel Pablo allotment which is classed as irrigable and other irrigable lands in the Flathead Irrigation District we as a yearly matter make an estimate of the amount of money that is going to be required to operate the project for a year, which estimate is sent to Washington for approval, and when approved, we notify the Flathead Irrigation District that it will require so much money to operate the project for the next year; then the Flathead Project adds to our esti-

(Testimony of Henry Gerharz.)

mate the amount they figure they will need for administration and then prorates the entire cost of the irrigable acreage and certifies it to the County Treasurer that they have raised so much taxes against these irrigable lands in the District and the County Treasurer collects it the same as he does any other taxes.

Recross Examination

By Mr. Hershey:

Our charge is just a service charge. The Flathead Irrigation District is our collection agency. I am not supposed to deliver any private water. I heard the testimony that Michel Pablo is entitled to 1,000 gallons a day. This water has been delivered to him. I have seen more than a thousand gallons on the Michel Pablo place many times. We only recognized the fact that this is 1,000 gallons that he is entitled to.

Redirect Examination

By Mr. Simmons:

No complaint has ever been made to me that Agnes McIntire, the plaintiff, was not receiving 1,000 gallons of water per day.

Redirect Examination

By Mr. Pope:

The thousand gallons referred to in the document I have identified is to be used for domestic and stock purposes. As a representative of the Indian

(Testimony of Henry Gerharz.)

Service I would not interfere with the [273] utilization of 1,000 gallons for any purpose the plaintiff might want it for. We consider that this land is entitled to 1,000 gallons.

(Amend said statement on pages 46, 47 and 48 by striking out all of the purported testimony of Alfonse Clairmont, written in narrative form, and insert therein the testimony of this witness as given by questions and answers.)

ALPHONSE CLAIRMONT,

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Mr. Clairmont, during the year 1919 were you appointed as a member of a private water rights committee by the Commissioner of Indian Affairs?

A. Yes, sir.

Q. I hand you herewith defendants' Exhibit 18, which is a report of a committee composed of Theodore Sharp, Alphonse Clairmont and A. P. Smyth, dated December 10, 1919, to the Commissioner of Indian Affairs, Washington, D. C., and I will ask you to examine that report briefly. Is that the report, Mr. Clairmont, that was made by this committee of which you were a member?

A. Yes, sir.

(Testimony of Alphonse Clairmont.)

Q. Do you recall, Mr. Clairmont, the different proceedings had by this committee, that is, what was done by the committee in a general way as to the obtaining of data on these early irrigation developments? [274]

A. Why you mean going around?

Q. Yes, what did you do in getting your facts together so that you could make these findings?

A. Well we posted up notices and went around and examined the ditches and the grounds.

Q. Did you as a member of that committee examine the Mitchel Pablo and the Lizette Barnaby tracts of land?

A. Yes.

Q. Did this committee hold hearings at Ronan, Montana, on November 19, 1913?

A. Yes.

Q. Was testimony taken of witnesses at that hearing?

A. Yes.

Q. Do you recall hearing the testimony of Michel Pablo at Ronan, Montana, as a member of this committee, on November 19, 1913?

A. Yes.

Q. I hand you herewith Defendants' offered exhibit number 27, and I will ask you to examine the same and read it. You read this testimony over before this time, that is, in the office of the United States Attorney?

A. Yes.

(Testimony of Alphonse Clairmont.)

Q. And did you hear Michel Pablo's testimony before this committee of which you were a member, on November 19, 1913?

A. Yes.

Q. And did you hear Mrs. Pablo's testimony before this committee of which you were a member, at Pablo, Montana, on June 3, 1919?

A. Yes. [275]

Q. Was the testimony given at this hearing at Ronan, Montana, on November 19, 1913, and at this hearing given at Pablo, Montana, on June 3, 1919, by Michel Pablo and Mrs. Pablo, identical with the testimony contained in question and answer form in defendants' offered exhibit number 27?

A. Yes.

Mr. Simmons: We now offer in evidence Defendants' offered exhibit 27.

Mr. Hershey: I would like to examine the witness concerning it.

The Court: Very well, you may do so.

Examination

By Mr. Hershey:

Q. When were you appointed commissioner?

A. 1913, wasn't it?

Q. No, you are answering?

A. What is that?

Q. When were you appointed on this commission?

A. 1913 or 1914.

Q. When was this testimony taken?

(Testimony of Alphonse Clairmont.)

A. Well it was taken right after, in 1914 I believe.

Q. In 1914. When was Mrs. Pablo's testimony taken—at the same time?

A. Well no.

Q. When was it taken?

A. Later on.

Q. You think this testimony was taken for Mr. Pablo in 1914?

A. As near as I can remember, yes.

Q. Where was it taken?

A. Ronan.

Q. In whose office? [276]

A. Well I don't know as I remember now; I think it was taken in one of the government houses there.

Q. Do you know who was present?

A. Well there were a whole lot of them in there, different cases.

Q. What official was present?

A. Well there were—what do you mean, on the commission?

Q. Yes, or who swore—was Pablo sworn?

A. Yes.

Q. In 1919?

A. In 1919.

Q. Yes.

A. Well I don't remember the year.

Q. Was Agate Pablo sworn?

A. Yes they were all sworn.

Q. Did Mrs. Pablo speak through an interpreter?

A. Yes.

(Testimony of Alphonse Clairmont.)

Q. She spoke through an interpreter?

A. Yes.

Q. Who was the interpreter?

A. Well I don't know, I don't remember that.

Q. What member of the commission was present?

A. Well it was either Morgan or Sharp, I don't know which one, now.

Q. You don't remember which?

A. No.

Q. You are not able to tell what they said are you?

A. Well he didn't say very much.

Q. But you can't tell whether he testified to these answers, to these questions and these answers that are written down here, [277] you couldn't tell now at this late time?

A. Well I can remember now that he said he didn't use much water.

Q. You remember that he didn't use much water. How often have you talked to his counsel with reference to this?

A. Which?

Q. This gentleman sitting here?

A. Oh just today.

Q. It hasn't been shown to you heretofore?

A. No.

Q. You didn't read it over in the attorney's office, this testimony?

Mr. Simmons: Well he testified that he had read it over.

(Testimony of Alphonse Clairmont.)

Mr. Hershey: Yes and I'm trying to bring out the facts and I have a right to examine him without any objection or suggestions on your part.

Q. (continued) Now you did read it over in their office?

A. Yes.

Q. It was read to you very carefully?

A. Yes.

Q. Once?

A. Yes.

Q. When was that?

A. This morning.

Q. Where was it, in this room out here?

A. Yes.

Q. And that's the only time you saw it?

A. That's all; well I read it over down to the office when they first put in the testimony.

Q. Where was that?

A. St. Ignatius.

Q. When was that? [278]

A. Well that was directly after we took the evidence.

Q. You read it over when they took it?

A. Yes.

Q. Where was that?

A. Well at St. Ignatius.

Q. Where are the papers that you read over?

A. Well it is in the form here somewhere.

Q. Was it taken down in long hand or written in typewriting?

(Testimony of Alphonse Clairmont.)

A. It was in typewriting, after it was in typewriting.

Q. Who was the stenographer?

A. Well there was a big fat fellow, I don't recall his name.

Q. Could Agate Pablo write?

A. No.

Q. Could Michel Pablo write?

A. No.

Q. Neither one of them wrote. Mark with a thumb, or was it a cross?

A. Yes, Michel Pablo could write his own name.

Q. He could write his own name?

A. Yes, and that's about all, I think.

Q. And that's about all you think he could do?

A. Yes.

Q. Did Agate sign with a cross?

A. I guess she did yes.

Q. You guess so?

A. She did sign it with her thumb.

Q. Isn't it a matter of fact that this is all guess work?

A. No it isn't.

Q. And you remember testimony taken in 1913 or 1914?

A. How is that? [279]

Q. You remember testimony taken in 1913 or 1914?

A. Yes.

Q. Which year was it?

(Testimony of Alphonse Clairmont.)

A. Which year?

Q. Yes, was it 1913 or 1914?

A. I think it was 1913 or 1914, I don't know which now.

Q. It might have been 1914?

A. Well it might have been.

Q. Might have been 1915?

A. Well I don't know as to that, I don't think so.

Q. Who else was present at that time?

Mr. Simmons: Objected to as repetition.

A. (No answer.)

Q. What other witness' testimony was taken at that hearing, anybody?

A. Well there were several others.

Q. Who were they?

A. Several cases.

Q. Who were they?

A. Well they were people right around the neighborhood there.

Q. Do you know their names?

A. Well there was Sullivan there and Alex McLeod, and different ones that had private water rights up there.

Q. Was Alex Pablo there?

A. I don't recall him being there.

Q. He is present in court?

A. Yes.

Q. Now as a matter of fact Pablo was dead in 1914 wasn't he?

A. Well he died that year some time.

(Testimony of Alphonse Clairmont.)

Q. He died that year, 1914, some time? [280]

A. (No answer.)

Mr. Hershey: We object to it; it is too far fetched. There may have been some proceedings had there.

The Court: Find out how it was taken; does he know whether it was written in long hand?

Q. Was it written in long hand or in typewriting and transcribed?

A. It was written in shorthand and then transcribed, I guess.

Q. You guess?

A. Well that is the way it was generally taken, in shorthand.

Q. And you can't tell who it was that took it in shorthand?

A. Well there were several different fellows with us.

Q. And was it signed that day—was it transcribed that day or was it signed later?

A. No.

Q. It wasn't signed that day?

A. It was transcribed after it got down to the office here at the Mission; they took it in shorthand.

Q. And then did Pablo follow it there and sign his name?

A. I don't know.

Q. You don't know that Pablo ever signed it?

A. No I don't.

Mr. Hershey: We object to it.

Mr. Simmons: If the court please, I may call the Court's attention to the map that is designated in that report, which was introduced as one of the ex-

(Testimony of Alphonse Clairmont.)

hibits in this case; the testimony refers to Map S-4050, which we have before the Court as one of the exhibits, and that of course is an official copy of a government record; the official books are kept with the Project and we have an official copy here which is kept in the Flathead Project, which contains the identical testimony; that copy was prepared in the Washington Office; we have the book [281] here of the testimony that was taken.

The Court: You have?

Mr. Simmons: Yes.

The Court: Well of course this is the form. I think I will admit it, and it may be considered, of course, in connection with the cross examination; as to what weight we will give it is another thing.

Mr. Hershey: I want to ask another question of this witness if I may.

The Court: All right.

Q. (By Mr. Hershey) Do you know whether it was ever read to Michel Pablo after it was written down by the stenographer?

A. No I don't.

Mr. Hershey: Now as a matter of fact in 1919 when this Agate Pablo is purported to give this testimony she wasn't the owner of the land and had sold it, and the deed shows that it had been transferred prior to the giving of that testimony.

The Court: Well that is a matter you can present of course in your proof, together with your cross examination. I will admit it. It is properly

(Testimony of Alphonse Clairmont.)

authenticated as a public document. And what weight will be given it and how the Court will regard it——

Mr. Hershey: —Just a minute—a suggestion made here.

Q. (By Mr. Hershey) As a matter of fact you know Michel Pablo couldn't read, don't you?

A. Couldn't read?

Q. (Mr. Hershey) Yes sir?

A. I don't think so.

Q. (By Mr. Simmons) Was there an interpreter present at these hearings who translated the English language into the Indian language? [282]

A. Yes, sir.

Q. (Mr. Simmons) Do you speak the Indian language?

A. Well, I don't speak it very plain, but I can understand pretty nearly every word.

The Court: Well, I will receive that, subject to your objection. What I will receive that, subject to your objection. What I will do with it later will depend on how I regard it at that time. [283]

Thereupon was received in evidence the instrument referred to, identified as Defendants' Exhibit 27, and being as follows:

DEFENDANTS' EXHIBIT 27

Admitted

(This is a certified copy from the records and files of the Office of Indian Affairs, Washington, D. C., so certified as of date June 3, 1936.)

MICHEL PABLO

Ronan, Montana

November 19, 1913.

Witness being first sworn, testified as follows:

Q. What is your full name and where do you live?

A. Michel Pablo; live 5 miles north of Ronan.

Q. Do you live on your own allotment?

A. Yes.

Q. How long have you lived there, Mr. Pablo?

A. I don't hardly recall, but must have been there over 30 years.

Q. Do you irrigate any of the land on your allotment?

A. Very little.

Q. Where do you obtain your water supply?

A. From Mud Creek.

Q. When was the ditch constructed to carry water for the irrigation of your allotment?

A. I believe that was made in 1891.

Q. And you have used water for irrigation ever since?

A. For my stock to drink out of and used it on some trees and switched into some gravelly places but not much.

Q. Is there some land irrigated on the Alex Pablo allotment, which is adjacent to your place?

A. Yes, it runs through his place.

Q. And some irrigated on Agate Pablo's land?

A. Yes.

Q. I will show you the map, S-4050, and ask if that fairly represents the location of the ditches and irrigated area on your allot- [284] ment and that of your children Alex and Agate Pablo?

A. Yes.

Q. Have you kept the ditch in repair ever since it was constructed?

A. Well, until here in the last three or four years. I never paid much attention to the head of it where it comes into the ditch and it is kind of washing out a little. I had water enough running in the ditch anyway.

Q. Is there a sufficient supply of water in Mud Creek to fill your ditch usually?

A. Yes.

Q. Mud Creek rises in the mountains to the east of you?

A. Yes.

Q. And the land is more or less springy around there?

A. Yes, all above the ditch.

Q. And on your allotment and on the two allotments of your children, Alex and Agate; how many acres do you estimate you irrigate?

A. I never took trouble to irrigate much of that, but about 4 or 5 acres where it is gravelly.

Q. The most of the soil there doesn't require much irrigation?

A. No.

Q. As a matter of fact you have built a drainage ditch, have you?

A. Yes.

MRS. PABLO

Pablo, Mont.

June 3, 1919.

Witness being first duly sworn, testified as follows:

Q. What is your name?

A. Mrs. Pablo.

Q. Has any water been used for irrigation on your land here the last six or seven years?

A. I don't use it for irrigation. Let it run for stock and house use. [285]

Q. How many years have you used it for that purpose?

A. Over 20 years.

Q. Who built the ditch?

A. My husband.

Q. Does anybody else use the water through your ditch except for these lands?

A. Only ones are the people that haul it.

Q. No land above or below that takes the water?

A. No sir. I don't think so.

FRANK C. MAYER

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

I am at present watermaster of the Pablo Division of the Flathead Irrigation Project. I have held this position since February 9, 1922. I cover the Pablo Division, Ronan Division, Pleasant Valley View and Round Butte Divisions on the Flathead Irrigation Project. I am familiar with the lands involved in this case. The land described is the Lizette Barnaby allotment and the Michel Pablo allotment owned by the plaintiff includes the McIntire. Since 1922 I have visited these lands a great many times. I have gone across the Pablo Ditch during the irrigation season sometimes two and three times a day and as a rule not less than several times a week. This statement holds for each year since 1922 up to and including the present time. I have recently made an examination of the Pablo Ditch; the last examination I made was on November 21, 1936. There has been very little irrigation done on this land since 1922. Three years ago there were a few little furrows plowed [286] out from the ditch on the Pablo eighty where the old house stands; and run down in the field a little ways, but I don't know whether there was water put into these ditches. We did not go out to examine. Two years ago there was another ditch

(Testimony of Frank C. Mayer.)

took out along the fence towards the house and water was run in that ditch. It was not run out on the ground that time. It was in the ditch. The use of this water from 1922 to the present time was more for stock purposes than anything else. I have noticed twenty acres on the Michel Pablo place being in crop, but it was never irrigated. I never saw any acres in crop on the Lizette Barnaby tract. In 1922 when I first examined the ditch I would say it had a capacity of perhaps a foot and a half of water, approximately 60 miner's inches. In 1922 the upper portion of the ditch was well growed up to willows and brush and pretty well filled up. The head of the ditch was about 18 inches wide and in depth, and after it comes out in the timber it hits rather sandy soil and is close to gravel so that the ditch there was widened out to about four or five feet. It was built shallow on account of the gravel being so close to the surface. When I examined the ditch a few days ago the only change in the ditch from that in 1922 was that it was in worse shape. The willows and brush had grown so much larger in the ditch. At no time that I examined the Pablo ditch was there any physical evidence in the ditch or on the ditch banks that would indicate that it had at any time a carrying capacity of four cubic feet of water per second of time or 160 miner's inches. There was no evidence from my observation that would indicate that it might have had a larger capacity in 1891. In all of the time that I have been over this land since

(Testimony of Frank C. Mayer.)

1922 and I have taken several trips a [287] week during that period over that land I have never seen any crops irrigated with the waters of Mud Creek through the Pablo Ditch on either the Michel Pablo or the Lizette Barnaby tracts.

I would say that the duty of water on these tracts to raise a decent crop would be about three acre feet per acre.

Cross Examination

By Mr. Hershey:

I am not accustomed to measuring water in cubic feet of water per second of time or miner's inches. One hundred miner's inches over a given period is a good irrigation head of water to irrigate land with. I stated in direct examination that no crops had been raised on either the Lizette Barnaby or the Michel Pablo tracts that have been irrigated. These tracts were not cropped this last year. A very poor crop was raised the year before.

Redirect Examination

By Mr. Simmons:

In my direct examination yesterday I made the statement that 2½ second feet or 100 miner's inches of water is needed to irrigate lands similar to the Pablo lands or the lands owned by Agnes McIntire on the Pablo allotment. I meant by that statement that a large head of water was required to go over this land quickly; that 2½ feet of water flowing for 24 hours, making 5 acre feet of water; I didn't

(Testimony of Frank C. Mayer.)

mean that continuous, all summer, or for the entire irrigation season, as they don't irrigate that way, they turn the water in for from four to ten days, something like that; then the water is taken off for two weeks; then it is turned back on again for a few days for the second or third irrigation, whatever it may be. The frequency of irrigation depends on the nature of crops being irrigated.

(Before the Government rested on behalf of the defendants it represented, at the request of the defendant Flathead Irrigation District and with the consent of the court Robert S. Stockton was called and testified as a witness in behalf of said defendant, Flathead Irrigation District.) [288]

ROBERT S. STOCKTON

was called as a witness on behalf of said defendant and having been heretofore duly sworn testified as follows:

Direct Examination

By Mr. Pope:

I acted in the capacity of Project Engineer in charge of construction on the Huntley Project near Billings, Montana from the spring of 1905 until the completion of the project, which took up to the fall of 1909 and I was then transferred to the Lower Yellowstone Project. From the summer of 1903 I was connected with the Reclamation Bureau and appointed in that year as an engineer. I served

(Testimony of Robert S. Stockton.)

with the Reclamation Bureau until March 1, 1911. For a period of nearly twenty-five years I have been Superintendent of Operation and Maintenance for the Canadian Pacific Railroad, Department of Natural Resources of a large irrigation project taking over 200,000 acres of land and with a large mileage of canals and laterals to maintain and operate. I have been retired by the Canadian Pacific and now reside on my ranch near Thompson Falls, Montana. I have had practical experience in irrigating my own land. I have heard most of the testimony during the progress of this trial with relation to the character of the land known as the Michel Pablo and Lizette Barnaby allotments. I have had occasion during my experience as irrigation engineer to study the problem of the duty of water. After listening to the testimony of witnesses as to the character of the Barnaby and Pablo lands and upon my knowledge gained from my survey in 1907 of lands generally on the Flathead and upon my general experience as an irrigation engineer I have formed an opinion as to the amount of water required for successful irrigation of lands of the character of the Pablo and Barnaby tracts. The proper duty of water for the Flathead lands would not be greater than one and a half to two acre feet per acre.

Defendants' Exhibit 8a shows a definite diversion of water from Mud Creek with the proposed canal line, which is on the map marked "C" line and which covers a considerable area of lands proposed to be irrigated. [289]

(Testimony of Robert S. Stockton.)

Direct Examination

By Mr. Simmons:

The flow of half a miner's inch to the acre for 120 days delivery on the land would amount to three acre feet. One hundred fifty days would be approximately the average duration of an irrigation season in the Flathead District.

And thereupon the following evidence was offered for the defendants Alex Pablo and A. M. Sterling, in behalf of their case in chief.

(By oral stipulation it was agreed by all the counsel that A. M. Sterling is the owner of the south half of the N*E* quarter of Section 14, Township 21 North, Range 20 West.)

Thereupon

ALEX PABLO,

one of the defendants last named was duly sworn and testified in behalf of said defendants as follows:

Direct Examination

By Mr. Swee:

I am a ward of the United States Government and live on my allotment which joins the Michel Pablo allotment on the northwest. My eighty runs east and west. The Michel Pablo allotment runs north and south. I have lived there practically all of my life. I am 47 years old and am a son of

(Testimony of Alex Pablo.)

Michel Pablo. When I was old enough to observe the conditions of my father's ranch my father had his allotment and my allotment and other lands there. We were allotted about the year 1908. When I was old enough to observe the conditions of his ranch my father had a ditch of water running to his land and to my land. Waters flowed in that ditch ever since I have been old enough to observe. There is water in it now. My father used that water for stock and domestic purposes and he used some for irrigation. Up to the time of my father's death in 1914 my father ran on the average about 1500 head of cattle on the Flathead, about 100 head of horses, and about 400 or 500 head of buffalo. I think he sold his buffalo in 1909. This ditch was used for drinking purposes for the stock. It was also used in the winter during the feeding season. This water was also used on his own allotment and my allotment and the land that belonged to my mother for irrigation purposes. Up to the time my father died in 1914 he irrigated about 20 acres on my allotment, raised hay mostly, some pasture. On my [290] mother's allotment now owned by Mr. Sterling he irrigated about 25 acres. The water was not used on that land every year. Whenever he had hay on it there he used it, but whenever he had other crops in he did not use it. Since I have started farming I have used the water for irrigating hay. I have farmed it and also leased my land. I now have it leased to Tom Moore. I have only raised hay and grain on my land. The

(Testimony of Alex Pablo.)

East 40 of my land needs water to raise a good crop.

DEFENDANTS' EXHIBIT 28

Admitted

(Defendants' Exhibit 28 represents a photograph taken in 1909 and 1910. It was taken toward the Mission Range and is an actual photograph of a portion of the Michel Pablo Allotment and the Pablo Ditch where the ditch runs over his allotment. It shows a picture of Michel Pablo on his horse. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

(Continuation of the Testimony of Alex Pablo.)

The irrigation of my mother's and my land has been almost continuous since I was old enough to farm.

Mr. Swee: If it please the Court, I have here a certified copy of the notice of appropriation filed by Mr. Pablo in this county in 1907, certified by the clerk and recorder of Missoula County.

Mr. Simmons: We object to the introduction of the Defendants' offered exhibit 29 in evidence for the reason that it is incompetent, irrelevant and immaterial and has bearing on any issue involved in this case. It is our position, substantiated by many recent cases, that no water right can be acquired on Indian Reservations under state appropriation—state filing.

The Court: Yes we have heard that a good many times.

(Testimony of Alex Pablo.)

Mr. Swee: May it please the Court this is——

Mr. Pope: May the record show a like objection is made on behalf of the defendant Irrigation District.

Mr. Hershey: This goes deeper than just the appropriation; it is a [291] sworn statement that he took out this water for the irrigation of certain lands; Pablo swears to this, that the purpose of taking it out was to irrigate certain lands, and as an affidavit made at that time it would have some evidentiary value of his intention.

The Court: Yes, aside from the appropriation, it might; but of course you have other evidence, of the actual digging of the ditches and the taking of the waters; you have now carried it way back to some time in the past. Perhaps for that purpose it would be admissible—unless you have some other objection that will exclude it, outside of the appropriation under the state statute.

Mr. Allen: We have the further objection that it is a self serving declaration.

The Court: Well I will overrule that. I think it might be very material; I will receive it at this time, subject to your objection, and make some future disposition of it.

Mr. Pope: If we may have an exception to the ruling?

The Court: Certainly.

Defendant Flathead Irrigation District's exception noted.

(Testimony of Alex Pablo.)

And thereupon, over the objections, was received in evidence the instrument referred to, the same being identified as and marked Defendant Pablo's Exhibit 29, and in words and figures as follows to wit:

DEFENDANTS EXHIBIT 29

(Admitted over the foregoing objections)

(This is a certified copy of an original Notice of Water Right, filed in the office of the clerk and recorder of Missoula County, Montana, and so certified)

L 1877 Compared

NOTICE OF APPROPRIATION

State of Montana,
County of Missoula,
Flathead Reservation—ss.

To All Whom These Presents May Concern: [292]

Be It Known, That Michel Pablo (No. 605) and his wife, Agate, Children Joseph, Mary and Alex, and grand-nieces, Mary and Philomene Pablo, of Flathead Indian Reservation in said County and State do hereby publish and declare, as a legal notice to all the world, as follows, to-wit:

I. That they have a legal right to the use, possession and control of and claim Five Hundred and Sixty (560) inches of the waters of Mud Creek in said County and State for irrigating and other purposes.

(Testimony of Alex Pablo.)

II. That the purpose for which said water is claimed, and the place of intended use is for domestic and irrigating purposes on the W½NW¼, SE¼NW¼ and NE¼SW¼ Sec. 13, Twp. 21, N., R. 20 W., M. M., W½NE¼, E¼SW¼ and NW¼ Sec. 14, Twp. 21 N., R. 20 W., M. M. and S½SW¼ Sec. 11, Twp. 21, N., R. 20 W., M. M.

III. That the means of diversion with size of flume, ditch, pipe, or acqueduct, by which *he* intends to divert the said water is as follows: A ditch 48 inches by 18 inches in size, which carries and conducts 560 inches of water from said Creek; which said ditch diverts the water from said stream at a point upon its North bank, and runs thence in a Westerly direction. The head of said ditch being about 150 yds. above the lands hereinbefore described, and being on land claimed by Marie Louise Pablo, thence over and upon said land (or mining claim).

IV. That they appropriated and took said water on the 15th day of April A. D. 1900 by means of said ditch.

V. That the names of the appropriators of said water Michel Pablo, Agate Pablo, Joseph Pablo, Mary Pablo, Alex Pablo, Mary Pablo and Philomene Pablo.

VI. That they also hereby claim said ditch and the right of way therefor, and for said water by it conveyed, or to be conveyed, from said point of appropriation to said land or point of final dis-

(Testimony of Alex Pablo.)

charge, and also the right of location upon any lands, of any dams, reservoirs, constructed or to be constructed, by them [293] conveyed, from said point of appropriation to said land or point of final discharge, and also the right of location upon any lands, of any dams, reservoirs, constructed or to be constructed, by them in appropriating and in using said water.

VII. That they also claim the right to keep in repair and to enlarge said means of water appropriation at any time, and the right to dispose of the said right, water, ditch or said appurtenance in part or whole at any time.

Claiming the Same All and Singular, Under any and all laws, National and State, and Local rulings and decisions thereunder, in the matter of water rights.

Together with All and Singular, The hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

Witness our hand at Ronan Montana, this 12th day of November, 1937.

M. PABLO,
AGATE PABLO,
JOSEPH PABLO,
MARY PABLO,
ALEX PABLO,
MARY PABLO,
PHILOMENE PABLO

Witness:

D. D. HULL

(Testimony of Alex Pablo.)

State of Montana,
County of Missoula—ss.

Michel Pablo having first been duly sworn, deposes and says that he is of lawful age and is one of the *appropriator* and *claimant* of the water and water right mentioned in the foregoing notice of appropriation and claim, and the person whose name is subscribed thereto as the appropriator and claimant, that he *know* the contents of said foregoing notice and that the matters and things therein stated are true.

M. PABLO

Subscribed and sworn to before me this 14th day of November A. D. 1907.

A. J. VIOLETTE
[Seal] Notary Public in and for Missoula County, Montana.

1877 Notice of Water Right. Filed for record Nov. 14th, A. D. 1907 at 2:10 o'clock p. m. and Recorded in Book F of Water Rights, on Page 277 Records of Missoula County, Montana. W. H. Smith County Recorder by Deputy Recorder. [294]

Cross Examination

By Mr. Allen:

In the years 1909 and 1910 my father ran on the average about 1500 head of cattle. He had about 100 head of horses and about 500 head of buffalo.

(Testimony of Alex Pablo.)

My father was chiefly a livestock man. He raised wheat and oats and hay. It was all used for the feed of his livestock. I don't recall the Commission that met on the Flathead Indian Reservation to take into consideration the claims of the various Indian wards as to the amount of water that they had been using on the Flathead Indian Reservation.

My mother's land was sub-irrigated on the west side, about twenty acres. The picture, identified as defendants' exhibit 28, was taken in the month of May during the spring run-off.

Cross Examination

By Mr. Hershey:

The sub-irrigation on a part of my land is caused by water in the Government ditches. Before the Government ditches were built there was no sub-irrigation.

Redirect Examination

By Mr. Swee:

The west end of my mother's land was sub-irrigated. My father irrigated the east end which is not sub-irrigated. The west end was sub-irrigated by water in the Government ditches which has ruined a part of my west 40.

THOMAS C. MOORE

being called as a witness on behalf of the defendants Alex Pablo and A. M. Sterling, after having first been duly sworn, testified as follows:

Direct Examination

By Mr. Swee:

I have lived on the Joe Pablo allotment since February, 1925. Am purchasing the Agatha Pablo land on contract for deed from the A. M. Sterling Company. I have farmed this land since 1925. I farmed the Michel Pablo land for a period of seven years commencing with 1925. I have also farmed the land belonging to Alex Pablo. I have used water from the Pablo Ditch for irrigation and for stock purposes. During the years I have irrigated the Agatha Pablo land I have irrigated approximately twenty or twenty- [295] five acres. I have raised beets, hay, and all kinds of grain. The Pablo ditch runs on this land.

When I had the Alex Pablo land leased I irrigated to some extent, but not a great deal. I may have irrigated about 10 acres, possibly a little more. I did not run very much water on the Alex Pablo land. It was pretty hard to get it over the land. I think every foot of the 80 can be irrigated. All but three acres of the land I am purchasing from A. M. Sterling can be irrigated.

I have made some repairs on the ditch. The ditch is not in very good condition. The dam is poor. The ditch could be enlarged. I have had seventeen years of irrigation experience both in the

(Testimony of Thomas C. Moore.)

Flathead and Bitter Root Valleys. The east half of the land that I am purchasing would take a lot more water than the west half. It takes a head of at least a cubic foot to get over the land. The same amount of water would be required to irrigate the Alex Pablo land.

While I was farming the Michel Pablo land I did not irrigate very much of it. I have watered about seventy five head of cattle and horses on an average.

Cross Examination

By Mr. Hershey:

There is not very much water going down the ditch at the present time. We utilized all that came down. It means a lot of work to fix the ditch up so that we could get a good head of water and none of us are able to fix it up at the present time.

Cross Examination

By Mr. Allen:

The capacity of the ditch at the head is a foot at the present time. Down where I live it might be a half a foot. There is no headgate in this ditch.

ANDREW STINGER

was called as a witness on behalf of the defendants Alex Pablo and A. M. Sterling, and being first duly sworn testified as follows:

Direct Examination

By Mr. Swee:

I have been living on the Flathead Indian Reservation since 1888. I was a partner at one time of Michel Pablo in the cattle [296] business. The partnership was formed in 1907 or 1908. I continued in partnership with Mr. Pablo until his death in 1914. I am familiar with the Pablo Ditch, have seen it many times, in fact, was on the land when the ditch was dug. Mr. Pablo told me he was getting a ditch for irrigation and stock water. Mr. Pablo and I ran about 3500 head of cattle and about 100 head of horses. That was about the yearly average during the time I knew Mr. Pablo. Mr. Pablo had about 450 head of buffalo. The livestock was all kept on the Pablo Ranch and my place adjoining his. The ditch was used for the watering of this stock. I never saw him irrigate out of the ditch.

Cross Examination

By Mr. Simmons:

Michel Pablo died in 1914. After his death the cattle were sold.

Cross Examination

By Mr. Hershey:

Whatever hay was raised on the Pablo Ranch was used as feed for livestock.

And thereupon Counsel for defendants Pablo and Sterling announced said defendants rest.

D. A. DELLWO

was called as a witness on behalf of the defendant, Flathead Irrigation District and having been first duly sworn testified as follows:

Direct Examination

By Mr. Pope:

I live in the vicinity of Charlo, Montana. I am one of the Commissioners of the Flathead Irrigation District as well as being Secretary of the Board of Commissioners. I have held these positions since 1926 when the District was organized. I have resided on the Flathead Reservation about twenty-two years. I homesteaded there in 1912 and later on sold the homestead and bought other land which I now live on. The land which I own is within the Flathead Irrigation Project. My land was at one time allotted. [297]

In the Flathead Irrigation District there are approximately 68,000 acres within the boundaries of the district. In addition to that there are numerous tracts of non-patented Indian lands which would make the total area of the project within that district of about 80,000 acres. This is all irrigated land. The irrigated area in the Mission Valley Division is in excess of 55,000 acres.

In 1912 the unallotted lands had practically all been homesteaded and of course, the allotted lands had all been taken or rather given to the allottee at that time. The lands had all been taken up in either one way or the other.

(Testimony of D. A. Dellwo.)

In 1926 through the repayment contract, which has been received in evidence, the Flathead Irrigation District assumed an obligation to the United States for the payment of the costs of the construction of the system. The main object of organizing the District was to assure the United States that the cost of construction would be repaid in return for which we had considerable assurance from the United States that our project would be completed. Upon the completion of the contract the ultimate per acre charge to the land owners is limited under the repayment contract to $65.00 per acre. There is no doubt that the cost will reach that figure. There are probably about 1300 or 1400 land owners in that district subject to that charge. In 1934 there were slightly over 1300 farms irrigated in the Mission Valley.

I am generally familiar with the system of irrigation works by which water is diverted for the lands of the district. The waters of Mud Creek form a portion of the supply for the district. The supply of water which can be brought to the lands by gravity is not sufficient. We are at present going beyond our natural watershed into what is known as the Placid Lake to get additional gravity water and then when all our sources have been exhausted and every possible diversion has been made we will be obliged to pump water from Flathead Lake to have anything like an adequate water supply. Pumping will involve extraordinary expense. Every

(Testimony of D. A. Dellwo.)

[298] acre foot of water lifted from Flathead Lake to the lands of the project will mean an additional per acre charge each year for operation and maintenance.

There has been an insufficient supply of water for lands within the District since perhaps the early twenties. Previous to that time there was not as strong an inclination to irrigate the wheat farming as possible, and the country was settled up with a lot of dry land farmers who were hesitant about irrigating, but since we have employed the irrigation type of farming I think without exception we have been short of water: in the last couple of years we have been very very short of water; during the present season, over a good part of the project we have only been able to allow about twelve inches of water to the irrigable farms with the clay types of soil and a little more in the gravelly type of soil. By twelve inches I mean an acre foot. The maximum amount of water used on land within that district on the best type of soil, I mean the soil underlaid with clay, we allowed, I believe, a foot and 15/100ths, possibly 20/100ths in one section of the project where we had an additional supply during the late months of the season through a pumping plant which was constructed this summer, and of course, in the Moiese Valley, where they have a supply of water that cannot be used anywhere else on the project and where they have an abundance of water for use as high as four feet; and there

(Testimony of D. A. Dellwo.)

are gravelly types of soil in the Moiese Valley part of the project.

The waters of Mud Creek have been diverted into the government project system ever since the construction of the Pablo Feeder Canal and then later on a diversion was installed farther down the creek to pick up additional water that circulated through farther down the creek.

I am familiar with the lands owned by the plaintiffs in this action. I am familiar with irrigating practices and I irrigate my own farm. The duty of water for plaintiff's land would be from [299] three to perhaps five acre feet depending largely on two factors, the amount of rainfall and the kind of irrigator or the type of an irrigation system that might be used on the farm. By three to five acre feet I mean a depth of water that deep over the irrigable area of the farm.

Cross Examination

By Mr. Simmons:

I have never observed any extensive irrigation on either of these eighties.

Cross Examination

By Mr. Hershey:

The waters of Mud Creek are carried away by the Government system in the Pablo Feeder Canal and are used upon lands that had no water prior to the construction of the system. To a very large extent lands are now being irrigated that had no

(Testimony of D. A. Dellwo.)

water prior to the building of the Pablo Feeder Canal.

Cross Examination

By Mr. Swee:

The water that goes by the feeder canal and runs into Mud Creek out of which this Pablo Ditch was taken is picked up in the Crow Reservoir, which is farther down the creek. Spring Creek and Crow Creek also feed the Crow reservoir. The Lower Crow Creek Reservoir supplies the Moiese Valley. Water cannot be taken out of the Crow Creek Reservoir for use on any other portion of the project. In the past all of the water in the Crow Creek Reservoir has not been necessary for use in the Moiese Valley. During the last three years probably sixty five per cent of the water that passed through Crow Reservoir was used in the Moiese Valley, the balance of it went to waste. We now have a means of saving water that previously has been going to waste in the Crow Reservoir. A pumping plant has been installed which will lift around 18,000 feet of water each year into Nine Pipes Reservoir, making water available in what is known as the Big Flat or Post Division, which is water out of Crow Creek and Spring Creek. It affects the water in Mud Creek in this way, that if there should be no further water wasted out of Crow Reservoir, the waters of Mud Creek will be used [300] principally to supply the Moiese Valley and the waters of Spring Creek will be almost entirely diverted to the

(Testimony of D. A. Dellwo.)

Nine Pipe Division of the Project. The plant is capable of pumping all of the water that is gathered out of Crow Creek and Spring Creek into Nine Pipe except during times of high flood. Crow Creek is, of course, diverted not only by the Pablo Feeder Canal, but also by the Kicking Horse Feeder Canal which is lower down the creek.

Redirect Examination

By Mr. Pope:

The Crow Reservoir is a reservoir far down Crow Creek. It drains an area of about 65,000 acres and handles all of the spring run-off from that 65,000 acres. It takes very little water from the normal flow of Crow Creek at the present time. Today I would say roughly that there is not more than three second feet of water coming down Crow Creek. The Pablo Feeder Canal which runs into the Pablo Reservoir picks up the waters of Mud Creek much farther up. There is a very acute shortage of water over the entire area served by the Pablo Reservoir. This shortage has existed ever since irrigation has been taken up. In the area north of Mud Creek and Crow Creek, which is the area served through Pablo Reservoir, if all of the available gravity water that could possibly be diverted could be taken there, it would not have more than a fifty per cent supply of water.

Mr. Pope: If the Court please, for the purpose of completing the record in this matter, counsel have kindly indicated they would stipulate that the

(Testimony of D. A. Dellwo.)

allotments here in question, that is, those of the claim of the plaintiff and those of the defendants Sterling and Alex Pablo, were made by trust patent dated October 8, 1908. May the record so show?

Mr. Swee: This is agreeable to us.

Mr. Pope: And we desire to call to the Court's attention for the purpose of judicial notice—and for convenience we will ask to offer the documents themselves—that portion of the official report of the Reclamation Service, marked "7th Report, 1908, relating to the [301] Flathead Project; and we desire in this connection to have the Court take judicial notice of the letters of transmittal, giving the dates, in the first page of the book, and that portion relating to the Flathead Project found on pages 100 and 101; and if it is agreeable to the Court and counsel, these being library books, might we have this designated as an exhibit and have the stenographer, at our expense, make a copy for the convenience of the Court? Would that be agreeable?

Mr. Hershey: That is satisfactory except of course that it would go in under our general objection.

The Court: Oh yes.

Mr. Hershey: That it is an attempt to modify vested rights.

The Court: Yes it will go in under your objection. You may mark off the parts so as not to encumber the record with any unnecessary parts. Mark the parts that you think the Court should consider.

(Testimony of D. A. Dellwo.)

And thereupon was received in evidence the references referred to, identified as and marked Defendant Flathead Irrigation District's Exhibit 31, taken from the Seventh Annual Report of the Reclamation Service, 1907-1908, and being as follows:

DEFENDANT FLATHEAD IRRIGATION DISTRICT'S EXHIBIT 31

Admitted

(Defendant Flathead Irrigation District's Exhibit 31 represents excerpts taken from the 7th Annual Report of the Reclamation Service, 1907-1908. This exhibit has been certified to the Circuit Court of Appeals as a portion of the records in this case.)

DEFENDANT FLATHEAD IRRIGATION DISTRICT'S EXHIBIT 32

Admitted

(Defendant Flathead Irrigation District's Exhibit 32 represents excerpts of the official report of the Reclamation Service contained in the 8th Report, 1909, including letters of transmittal. This exhibit has been certified to the Circuit Court of Appeals as a portion of the record in this case.)

[302]

The defendant Flathead Irrigation District rests.

(Testimony of D. A. Dellwo.)

The defendant, the United States of America, Henry Gerharz, Project Engineer, and the nineteen members of the Flathead Tribe of Indians represented by Government Counsel rest.

By agreement between all Counsel all new matters raised in the answers of all parties was deemed denied without need of a written reply.

MR. DELLWO

being recalled with the permission of the Court and all Counsel as a witness for the defendant, Flathead Irrigation District, testified as follows:

Redirect Examination

By Mr. Pope:

In 1910 the lands on the Flathead Indian Reservation had all been taken up either through allotment to the Indians or through having been homesteaded, except a few scattered tracts, just an odd 80 acre tract here and there and in the month of November, 1910 they were thrown open to general homestead entry and I filed on one of those. The Irrigation District lands consist of lands that had been taken by homestead and lands that had at one time been allotted lands, but had become patented and had become transferred over to white people, or are still being held under fee patent by the original allottees.

Thereupon the defendant Flathead Irrigation District rested.

Whereupon the following evidence was introduced by plaintiff in rebuttal.

JEAN McINTIRE

was called as a witness in rebuttal and testified as follows:

Direct Examination

By Mr. Hershey:

On this map the two tracts, eighty acres each, marked 1 and 2 in red are the lands my mother owns. All of those lands are fenced. The ditch is not properly placed on the map. It shows that this ditch on the Lizette Barnaby tract does not touch this particular eighty. Well, that is not correct. There is a fence between these two eighties. This Mary Louise Pablo eighty and the [303] Lizette Barnaby eighty and this ditch comes straight through here. It comes to this fence and then turns to the north and then goes out as is shown on the map. The Pablo and the Barnaby eighties slope to the south. The ditch would run through the highest point on the farming land. Mud Creek runs through the southeast corner of the Barnaby land. All of the Barnaby land can be irrigated from the ditch. About half of it is irrigated, the east half of the eighty. That is the land a witness talked about as being swampy. Water has been turned out of the ditch. It dries up the irrigated land in the southeast which demonstrated that all the water came from the ditch.

During the times that I have been up there during the irrigation season the only water that flows down below the Pablo Feeder Canal where it crosses

(Testimony of Jean McIntire.)

Mud Creek is some springs and what seeps out of the canal or underneath the canal. There is a gate on the Government ditch, but the gate as always closed. It is impossible under present conditions to farm the land properly. It is impossible to raise a good crop without irrigation and it has been impossible for us to get sufficient water for it is not available.

We have not repaired the ditch and it is in poor repair now because there has been this water dispute on as to whether the Government was entitled to control the waters of Mud Creek or whether we were entitled to sufficient water to irrigate our lands.

I received a letter from the present project engineer, Mr. Gerharz this fall. There was a dispute that we were taking more water out of the ditch than we had a right to. Mr. Gerharz enclosed a letter from the United States Attorney telling us to discontinue taking out of Mud Creek only the water that we were allowed and if we did not do that, Mr. Gerharz was to notify him and he was to start action against us. His order was to remove the dam. The map referred to is defendant's exhibit 6. [304]

Cross Examination

By Mr. Allen:

I have had the course of the ditch surveyed, but do not have the report with me. The fence corners are on the line. There is also a tangent which makes it impossible, as this map shows, for the ditch to run as shown here on the map, in other words you

(Testimony of Jean McIntire.)

couldn't run the water as shown. These fences have been tied in by survey to a Government corner. This was done just after we got the land. We have iron stakes in there to show where these corners are. All the irrigation that we have done on these two eighties was done from the waters below the ditch. There was no water available to irrigate these two eighties from the Pablo ditch.

The west eighty is under the Flathead Indian Irrigation Project. The project officials told us we had a private water right only for stock and domestic purposes. When this land was in Flathead County—the water charges came with our taxes—we saw Mr. Moody and told him as long as we were paying for this water we would like to have it delivered, if we had no private right, and we had a controversy—I can't show you here on the map—it was peculiar—the Government ditch comes in just the opposite corner from where our private water right comes in, and it did not look reasonable to me; for instance, if you had water coming in that corner of this room to irrigate this room, and water coming in over here, then one must be wrong, so I told Mr. Moody about that and he said: "Well, you have Mayer check that up" so I went out and saw Mr. Mayer and Mr. Mayer told me that there was no culvert under the railroad, if I recall correctly, and that the ditch at that time, the Government ditch, was not completed down on to this land and it was necessary to do some work; and Mr. Mayer advised it was not practical to irrigate this land

(Testimony of Jean McIntire.)

with Government water on account of taking so much; Mr. Moody agreed to withdraw the land from the project; he said he could not do it legally and he said he would just simply withdraw the charges and he did that. We went on for a [305] year or two and was taken out of our taxes. Then when Mr. Gerharz came in as Project Manager he put the land back in and claimed that he had no right to take it out without a court order. We have been paying these water charges. We were advised by the County Treasurer that we would have to start suit within sixty days if we did not pay them. They were never paid under protest. We haven't demanded that the Flathead Indian Irrigation Project furnish us water for the 60.8 acres in the west eighty which is held to be irrigable land under the project for the reason that this litigation has been pending for about four years. When I say there was not sufficient water available I mean from the Pablo Ditch. The east eighty is not under the Flathead Irrigation Project.

Redirect Examination

By Mr. Hershey:

We have been paying for water from the Reclamation Service which has never been furnished and we were compelled to do so in order to pay our property taxes in the county and state. There was not any water in the ditch because the government takes all the water, with the exception of that which comes out of the springs.

(Testimony of Jean McIntire.)

Mr. Hershey: I have been making a motion and objection to the exhibits that they have been offering, and I was just wondering, for the record, whether it wouldn't be wise to make a motion at this time to strike all those exhibits out, and with your permission I would like to make such a motion.

The Court: Yes you may make such a motion. You have already objected, and I have allowed them to go in under your objection. I may sustain your objection later on. This is an equity suit.

Mr. Hershey: Well the only point that I could make is that possibly to some of them the record may not show there was an objection made, and I believe it is from exhibit 6 to the close, [306] are all exhibits relating to matters and proceedings subsequent to the initiation of the rights to this water, and so I now move to strike them out and not consider them for the reason that the government of the United States cannot take away or annul or destroy any vested rights to the waters appropriated for the irrigation of these lands; a patent having issued to the lands, by relation the rights would relate back to the day when the rights were first initiated, or at least prior to 1891, and for that reason they are all immaterial and are an attempt to modify and destroy vested rights.

The Court: Very well, the matter will be taker under advisement, of course.

FRANK C. MAYER

was called as a witness in sur rebuttal and having been first duly sworn testified as follows:

Direct Examination

By Mr. Allen:

I never made the statement to my knowledge that the west eighty of the McIntire land was not accessible to water from the Government ditches. The 60.8 acres of the west eighty is in fact irrigable from the Government ditch.

Cross Examination

By Mr. Hershey:

The water in the Pablo ditch as irrigated on the map runs in a westerly direction and runs within 400 feet of the northwest corner of the eighty acres. Water could not be turned into the ditch and run just the opposite direction to what it is now. The ditch coming in at the northwest corner would be closer and there would be less land missed by coming in at that point than where the ditch comes in at the present time. It would follow through and reach a few hundred feet south of the northeast corner of the eighty. The Government ditch is built down to within sixty feet of the McIntire land. There is a railroad grade between and no provision made for a culvert. A portion of the land is on the west side of the railroad which could be easily reached as well as the land on the east. There would have to be a culvert placed under the railroad. [307]

(Testimony of Frank C. Mayer.)

Redirect Examination

By Mr. Allen:

Water could be delivered within 48 hours to the McIntire land.

The Court: Well now what do you mean by the McIntire land?

Q. What part of the land do you mean by the 48 hours you could put a culvert in there in that time? What portion of it could be irrigated? Now you speak of the railroad track running through there; how much of it could be irrigated, as the ditch stands now? You say it is within 60 feet of the land?

A. Yes it is just across the road.

Q. How much land could be irrigated?

A. Why I couldn't say off hand; there is a little strip in here of perhaps six or eight or ten acres, along in there on the west side of the road.

The Court: That is, that the ditch could now irrigate?

A. Yes sir, until a culvert is put under the railroad.

Whereupon the testimony was closed.

And now within the time allowed by law and order of court herein the defendant, the United States of America, Henry Gerharz, Project Manager of Flathead Reclamation Project, and the

nineteen members of the Flathead Tribe of Indians, appellants herein, lodge the foregoing proposed statement of the evidence and ask the same be signed, settled, and approvd.

JOHN B. TANSIL
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS
District Counsel, Department of Interior, United States Indian Irrigation Service, Counsel for above named defendants.

[Endorsed]: Lodged this 18th day of November, 1937 with the Clerk of the above entitled court.

.....
Clerk, United States District Court.
By.....
Deputy Clerk. [308]

CERTIFICATE OF JUDGE

I, Charles N. Pray, Judge of the above entitled Court and the Judge before whom said cause was tried hereby certify that the foregoing is a true and correct narrative statement of the evidence in the above entitled cause and that the same is now by me duly settled, allowed, and approved within the judg-

ment term as the Statement of Evidence in said cause.

Dated this 30th day of November, 1937.

CHARLES N. PRAY
Judge.

[Endorsed]: Lodged in Clerk's Office November 18, 1937. Filed Nov. 30, 1937. [309]

Thereafter, on January 24, 1938, Assignment of Errors of the United States was filed herein, in the words and figures following, to-wit: [310]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, the United States of America, and files the following Assignment of Errors upon which it relies in prosecution of its appeal from the decree in said suit made and entered by the above entitled court on November 14, 1937, viz.:

I.

The Court erred in overruling the motions of the defendant, the United States of America, to dismiss the original and the amended Bills of Complaint.

II.

The Court erred in overruling the motion of the defendant, the United States of America, for judgment upon the pleadings.

III.

The Court erred in holding that the defendant, the United States of America, has consented to be sued in this action. [311]

IV.

The Court erred in entering judgment against the defendant, the United States of America.

V.

The Court erred in holding in effect that the plaintiff, Agnes McIntire and the defendants, the United States of America, Alex Pablo and A. M. Sterling, are tenants in common or joint tenants in the use of the waters of Mud Creek.

VI.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants.

VII.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to described lands, now owned by the plaintiff and the defendants, A. M. Sterling and Alex Pablo, by reason of an appropriation of such waters by the predecessor in interest of the plaintiff and of the above named defendants.

VIII.

The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned.

IX.

The Court erred in holding that the maintenance of a dam in Mud Creek, by the defendant, Henry Gerharz, acting for the defendant, the United States of America, as Engineer and Project Manager of the Flathead Indian Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful. [312]

Now, therefore, defendant prays that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [313]

Thereafter, on January 24, 1938, Assignment of Errors of the Secretary of the Interior was filed herein, in the words and figures following, to-wit: [314]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, the Secretary of the Interior, in the above entitled cause, and files the following Assignment of Errors upon which he relies in prosecution of his appeal from the decree in said suit made and entered by the above entitled Court on November 14, 1937, viz.:

I.

The Court erred in overruling the motion of the defendant, the Secretary of the Interior, to dismiss the original Bill of Complaint.

II.

The Court erred in entering judgment against the defendant, the Secretary of the Interior. [315]

Now, therefore, the defendant prays that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [316]

Thereafter, on January 24, 1938, Assignment of Errors of Henry Gerharz was filed herein, in the words and figures following, to-wit: [317]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, Henry Gerharz, Engineer and Project Manager of the Flathead Indian Reservation, and files the following Assignment of Errors upon which he relies in prosecution of his appeal from the decree in said suit made and entered by the above entitled court on November 14, 1937, viz.:

I.

The Court erred in overruling the motions of the defendant, Henry Gerharz, to dismiss the original and the amended Bills of Complaint.

II.

The Court erred in entering judgment against the defendant, Henry Gerharz. [318]

III.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants.

IV.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to described lands, now owned by the plaintiff and the defendants, A. M. Sterling and Alex Pablo, by reason of an appropriation of such waters by the predecessor in interest of the plaintiff and of the above named defendants.

V.

The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned.

VI.

The Court erred in holding that the maintenance of a dam in Mud Creek, by the defendant, Henry Gerharz, acting for the defendant, the United States of America, as Engineer and Project Manager of the Flathead Indian Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

VII.

The Court erred in holding that the above mentioned maintenance of a dam in Mud Creek by the defendant, Henry Gerharz, is a trespass for which the defendant, Henry Gerharz, must personally account and for which his employment is no defense. [319]

Now, therefore, defendant prays that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [320]

Thereafter, on January 24, 1938, Assignment of Errors of the members of the Flathead Tribe of Indians was filed herein, in the words and figures following, to-wit: [321]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the defendants, Lou Goodale Bigelow Krout, Alphonse Clairmont, Alice Clairmont, Henry Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph A. Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. Remiers, Administrator of the estate of R. W. Jamison, deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. B. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Gertrude A. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley and W. A. Dupuis, members of the Flathead Tribe of Indians, in the above entitled cause, and file the following Assignment of Errors upon which they rely in prosecution of their appeal from the decree in said suit made and entered by the above entitled Court on November 14, 1937, viz.: [322]

I.

The Court erred in entering judgment against the defendants, members of the Flathead Tribe of Indians.

II.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants.

III.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to described lands, now owned by the plaintiff and the defendants, A. M. Sterling and Alex Pablo, by reason of an appropriation of such waters by the predecessor in interest of the plaintiff and of the above named defendants.

IV.

The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendant, Alex Pablo and A. M. Sterling, has never been abandoned.

V.

The Court erred in holding that the maintenance of a dam in Mud Creek, by the defendant, Henry Gerharz, acting for the defendant, the United States of America, as Engineer and Project Manager of the Flathead Indian Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

Now, therefore, defendants pray that the decree herein be reversed.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

[Endorsed]: Filed Jan. 24, 1938. [323]

Thereafter, on January 24, 1938, Petition for Allowance of Appeal of the United States of America, et al., was filed herein, in the words and figures following, to-wit: [324]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project and the nineteen members of the Flathead Tribe of Indians, defendants in this action, feeling themselves aggrieved by the decree made and entered in this cause on the 17th day of November, 1937, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and said defendants pray that their appeal be allowed and that citation issue as provided by law, and that the transcript of record, proceedings and papers upon which said decree was based, duly

authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California. [325]

Dated this 20th day of January, 1938.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Dept. of Interior
U. S. Indian Irrigation Service,
Counsel for Defendants.

[Endorsed]: Filed Jan. 24, 1938. [326]

Thereafter, on January 24, 1938, Prayer for Reversal of the United States of America, et al., was filed herein, in the words and figures following, to-wit: [327]

[Title of District Court and Cause.]

PRAYER FOR REVERSAL

Come now the defendants, the United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, and the nineteen members of the Flathead Tribe of Indians and pray that the decree entered herein in the District Court of the United States in and for the District of Montana on the 17th day of November, 1937, be reversed by the United States Circuit Court of

Appeals for the Ninth Circuit, and that such other and further orders as may be fit and proper in the premises be made in the above entitled cause by said Circuit Court of Appeals.

Dated this 20th day of January, 1938.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, Dept. of Interior,
U. S. Indian Irrigation Service.

[Endorsed]: Filed Jan. 24, 1938. [328]

Thereafter, on January 24, 1938, Order Allowing Appeal of the United States of America, et al., was filed herein, and was duly entered herein on January 25, 1938, being in the words and figures following, to-wit: [329]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading and considering the petition for appeal on file herein, together with the assignment of errors on file herein:

It is hereby ordered that the appeal of the United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, and the nineteen members of the Flathead Tribe of Indians, defendants and appellants, to the United States Circuit

Court of Appeals for the Ninth Circuit, be and the same is hereby allowed.

Dated this 24th day of January, 1938.

CHARLES N. PRAY

Judge

[Endorsed]: Filed Jan. 24, 1938. [330]

Thereafter, on January 29, 1938, Citation on Appeal, issued by the Court on January 24, 1938, was duly filed herein, the original Citation being hereto annexed and being in the words and figures following, to-wit: [331]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States of America: To Agnes McIntire, plaintiff in the above entitled action, and Elmer E. Hershey, her attorney:

You are hereby notified that in the above entitled cause in equity in the United States District Court in and for the District of Montana an appeal has been allowed to the United States Circuit Court of Appeals for the Ninth Circuit; and you are hereby cited and admonished to be and appear in said Circuit Court of Appeals on or before 30 days from the date of signing this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, the 24th day of January, 1938.

CHARLES N. PRAY
Judge. [332]

Service of a copy of the above citation is hereby acknowledged this 27th day of January, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff
POPE & SMITH
By RUSSELL E. SMITH
Attorneys for Flathead Irrigation District.
JOHN P. SWEE
Attorney for Alex Pablo and A. M. Sterling [333]

[Endorsed]: Filed Jan. 29, 1938. [334]

Thereafter, on February 2, 1938, Petition for Allowance of Appeal of the Flathead Irrigation District was duly filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

To the Hon. Charles N. Pray, District Judge:

The Flathead Irrigation District, a corporation, defendant in this action, feeling aggrieved by the decree made and entered in this cause on the 17th

day of November, 1937, and for the purpose of joining in the appeal of the United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, and nineteen members of the Flathead Tribe of Indians, heretofore taken and perfected in this cause, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and said defendant prays that its appeal be allowed and that citation issue as provided by law, and that the transcript of record, proceedings and papers upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of *Montana*.

And your petitioner further prays that a proper order relating to the security to be required of it be made.

Dated this 31st day of January, 1938.

WALTER L. POPE
RUSSELL E. SMITH
Missoula, Montana.
Solicitors for defendant, Flathead Irrigation District, a Corporation.

[Endorsed]: Filed February 2, 1938. [335]

Thereafter, on February 2, 1938, Assignment of Errors of the Flathead Irrigation District was duly filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the defendant, Flathead Irrigation District, a Corporation, and makes and files the following assignment of errors, upon which it relies in the prosecution of its appeal from the decree in the above entitled cause made and entered by the above entitled Court on November 14, 1937, viz:

I.

The Court erred in overruling the motion of the defendant, Flathead Irrigation District, to dismiss the last Amended Bill of Complaint.

II.

The Court erred in entering judgment against the defendant, Flathead Irrigation District.

III.

The Court erred in holding in effect that the plaintiff, Agnes McIntire, and the defendants, The United States of America, Alex Pablo and A. M. Sterling, are tenants in common or joint tenants in the use of the waters of Mud Creek.

IV.

The Court erred in holding that the waters of Mud Creek are now, or ever have been, subject to

private appropriation by the plaintiff, Agnes McIntire, or by the defendants, Alex Pablo and A. M. Sterling.

V.

The Court erred in holding that the rights of the plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, to the use of the waters of Mud Creek are prior to the rights of the United States and the defendant, Flathead Irrigation District. [336]

VI.

The Court erred in holding and finding that the lands of the plaintiff and the defendants, Alex Pablo and A. M. Sterling, required one inch to the acre for the proper irrigation thereof.

VII.

The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to the lands now owned by plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, by reason of an appropriation of said waters by the predecessors in interest of the plaintiff and of said defendants.

VIII.

The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, are entitled to the use of one inch per acre of the waters of Mud Creek to irrigate the described lands belonging to the plaintiff and said defendants.

IX.

The Court erred in holding that the maintenance of a dam in Mud Creek by the defendant, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

X.

The Court erred in finding that the above-mentioned appropriations of the waters of Mud Creek by the predecessors in interest of the plaintiff and the defendants, Alex Pablo and A. M. Sterling, have never been abandoned.

Wherefore, this defendant prays that the decree herein be reversed.

Dated this 31st day of January, 1938.

WALTER L. POPE
RUSSELL E. SMITH
Attorneys for Defendant,
Flathead Irrigation District

[Endorsed]: Filed February 2, 1938. [337]

Thereafter, on February 14, 1938, Order Allowing Appeal of Flathead Irrigation District was filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading and considering the petition for appeal on file herein, together with the assignment of errors on file herein;

It Is Hereby Ordered that the appeal of Flathead Irrigation District, a corporation, defendant and appellant, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby allowed upon the defendant giving bond as required by law in the sum of $500.00.

Dated this 5th day of February, 1938.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed February 14, 1938. [338]

Thereafter, on February 14, 1938, Undertaking on Appeal of Flathead Irrigation District was filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, the defendant, Flathead Irrigation District, in the above entitled action has petitioned the above named court for an order allowing its appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit, from that certain judgment entered in the above entitled action on the

17th day of November, 1937, in favor of the plaintiff and the defendants, Sterling and Pablo, and against the defendant, Flathead Irrigation District; and

Whereas, the above named court has by its order duly given, made and entered, allowed the said appeal of the defendant upon its furnishing good and sufficient security in the sum of $500.00 that it, as said appellant, shall prosecute its appeal to effect, and if it fail to make its plea good, shall answer all costs;

Now, Therefore, the undersigned, United States Fidelity and Guaranty Company, a corporation, allowed to become surety under and by virtue of the laws of the United States and of the State of Montana upon bonds and undertakings, in consideration of the premises and of the aforesaid appeal, does hereby jointly and severally undertake in the sum of $500.00, and promise to the effect that said defendant as said appellant will prosecute its appeal in the above entitled action to effect, and, if it fail to make its plea good, shall answer all costs only, not exceeding the said sum of $500.00.

The undersigned hereby expressly agrees that in case of any breach of any condition of this undertaking the above named court may upon notice to the undersigned of not less than ten (10) days, proceed summarily in the above entitled action in which this undertaking is given, to ascertain the amount which the undersigned as surety upon this

undertaking is bound to pay on account of such breach thereof by the defendant, and render judgment therefor against the undersigned and award execution therefor. [339]

In Witness Whereof, said corporation has hereunto caused its name to be subscribed and its seal to be affixed by its agent thereunto duly authorized, this 11th day of February, 1938.

UNITED STATES FIDELITY
[Seal] & GUARANTY COMPANY
Baltimore, Maryland
By ARTHUR E. DREW
Its Attorney in Fact

The foregoing undertaking is approved this 14th day of February, 1938.

CHARLES N. PRAY
District Judge.

[Endorsed]: Filed February 14, 1938. [340]

Thereafter, on February 19, 1938, Citation on Appeal, issued by the Court on February 5, 1938, was duly filed herein, the original Citation being hereto annexed and being in the words and figures following, to-wit: [341]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States of America,—
ss. to Agnes McIntire, plaintiff in the above entitled action, and to Elmer E. Hershey, her attorney; Alex Pablo and A. M. Sterling, defendants in the above entitled action, and to John P. Swee, their attorney:

You, and Each of You, Are Hereby Cited and Admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the [342] District of Montana, Missoula Division, in a suit wherein United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Manager of the Flathead Reclamation Project, Lou Goodale Bigelow Krout, Alphonse Clairmont, Alice Clairmont, Henry Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph A. Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. Ramiers, Administrator of the estate of R. W. Jamison, deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. D. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Ger-

trude A. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley, W. A. Dupuis, and Flathead Irrigation District, a Corporation, are appellants, and you, the said Agnes McIntire, A. M. Sterling and Alex Pablo are appellees, to show cause, if any there be, why the decree rendered against the said appellants should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Hon. Charles N. Pray, Judge of the District Court of the United States for the District of Montana, the 5th day of February, 1938.

CHARLES N. PRAY
Judge. [343]

Service of the foregoing Citation on Appeal acknowledged this 9th day of February, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff, Agnes McIntire.

JOHN P. SWEE
Attorney for Defendants, A. M. Sterling and Alex Pablo. [344]

[Endorsed]: Filed Feb. 19, 1938. [345]

Thereafter, on February 19, 1938, Amended Citation on Appeal, issued by the Court on February 11, 1938, was duly filed herein, which original Amended Citation on Appeal is hereto annexed and is in the words and figures following, to-wit: [346]

[Title of District Court and Cause.]

AMENDED CITATION ON APPEAL

The President of the United States of America; To Agnes McIntire, plaintiff in the above entitled action, and Elmer E. Hershey, Esq., her attorney; Flathead Irrigation District, a corporation, defendant in the above entitled action, and Messrs. Pope and Smith, defendant's attorneys; and to Alex Pablo and A. M. Sterling, defendants in the above entitled action and John P. Swee, Esq., their attorney:

You are hereby notified that in the above entitled cause in equity in the United States District Court in and for the District of Montana an appeal has been allowed to the United States Circuit Court of Appeals for the Ninth Circuit; and you are hereby cited and admonished to be and appear in said Circuit Court of Appeals on or before 30 days from the date of signing this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf. [347]

Witness, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, the 11th day of February, 1938.

CHARLES N. PRAY
Judge.

Service of a copy of the above citation is hereby acknowledged this 14th day of February, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff, Agnes McIntire

POPE AND SMITH
By RUSSELL E. SMITH
Attorneys for Defendant, Flathead Irrigation District.

Service of a copy of the above citation is hereby acknowledged this ..... day of February, 1938.

JOHN P. SWEE
Attorney for Defendants, Alex Pablo and A. M. Sterling

[Endorsed]: Filed February 19, 1938. [348]

Thereafter, on February 19, 1938, Praecipe of the United States of America, et al., for transcript of record on appeal was duly filed herein, in the words and figures following, to-wit: [350]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and incorporate in such transcript of record the following papers or exhibits.

I.

Original bill of complaint, and subpoena in equity filed and issued February 13, 1934, Affidavit of Return of Service upon the United States of E. E. Hershey, Esq. filed March 20, 1934, motion (ex parte) to direct the defendant, Harold L. Ickes, Secretary of the Interior to appear, filed March 22, 1934, order of court of March 23, 1934, directing defendant Ickes, to appear, return of service of order of March 23, 1934 and original bill of complaint on defendant, Ickes, by United States Marshal at Washington, D. C., on March 30, 1934, [351] Special Appearance and Objection to Jurisdiction of defendants, Ickes, the United States of America and Henry Gerharz, Project Manager, filed April 9, 1934; order of court of April 16, 1934 denying Objections to Jurisdiction of said defendants; answers of defendants, the United States of America and Henry Gerharz, Project Engineer to the original bill of complaint; replies to the above answers by the plaintiff, Agnes McIntire; first amended bill of complaint; motions to dismiss of defendants Alex Pablo and A. M. Sterling to the first amended bill of complaint; order of Court allowing appearances of the defendants, United States, Harold L. Ickes, Secretary of the Interior, and Henry Gerharz, Project Engineer made to the original bill of complaint to stand; second amended bill of complaint; special appearances of the defendants, the United States of America and Henry Gerharz, Project Engineer to the second amended bill of complaint; motion to dismiss of the defendants, the United States of America, the nineteen members of the

Flathead Tribe of Indians, and Alex Pablo and A. M. Sterling; motion to dismiss of the defendant, the Flathead Irrigation District; motion for judgment on the pleadings of the defendant, the United States of America; answers to second amended bill of complaint of the defendants, the United States of America, Henry Gerharz, Project Engineer, Flathead Irrigation Project, and nineteen members of the Flathead Tribe of Indians; answers of defendant, Flathead Irrigation District, and of defendants, Alex Pablo and A. M. Sterling; replies of plaintiff, to said answers of defendants.

II.

Service, if any, upon Harold L. Ickes, Secretary of the Interior, of either the first or second amended bills of complaint.

III.

The opinion of the Court after trial of the issues.

IV.

Order dated October 27, 1937 granting extension to lodge statement of evidence, petition for rehearing dated October 27, 1937 [352] of defendant, Flathead Irrigation District, and minute order of the Court denying such petition.

V.

Proposed findings of fact and conclusions of law, and objections thereto of all parties; adopted findings of fact and conclusions of law; decree.

VI.

The statement of the evidence signed and approved herein.

VII.

Petition for allowance of appeal; order allowing appeal; prayer for reversal; assignments of errors; and amended citation on appeal.

VIII.

The praecipe with acknowledgment of service thereon.

Said transcript to be prepared and fully certified by you, as required by law and the rules of the above entitled Court, *and the rules of the above entitled Court,* and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 10th day of February, 1938.

JOHN B. TANSIL
United States Attorney for
the District of Montana
KENNETH R. L. SIMMONS
District Counsel, U. S. I. I. S.

Service of the foregoing Praecipe is hereby acknowledged this 14 day of February, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff, Agnes McIntire
POPE & SMITH
By RUSSELL E. SMITH
Attorneys for Flathead Irrigation
District, a corporation

Service of the foregoing Praecipe is hereby acknowledged this day of February, 1938.

JOHN P. SWEE
Attorney for defendants Alex Pablo
and A. M. Sterling

[Endorsed]: Filed Feb. 19, 1938. [353]

Thereafter, on February 19, 1938, Praecipe of Flathead Irrigation District to incorporate in transcript of record certain additional papers was filed herein, in the words and figures following, to-wit:

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed the defendant, Flathead Irrigation District, a corporation, in the above entitled cause, and incorporate in such transcript of record, in addition to the matters incorporated therein pursuant to the praecipe of the United States Attorney for the District of Montana and the District Counsel of the United States Indian Irrigation Service, the following:

Defendant Flathead Irrigation District's Petition for Appeal;

Defendant Flathead Irrigation District's Assignment of Errors;

Order Allowing Appeal of defendant, Flathead Irrigation District;

Bond on Appeal;

Original Citation on Appeal;

This Praecipe;

Your Certificate to this Transcript.

Dated this 14th day of February, 1938.

WALTER L. POPE
RUSSELL E. SMITH
Solicitors for Defendant,
Flathead Irrigation District

Service of the foregoing Praecipe accepted and receipt of a copy acknowledged this 15th day of February, 1938.

ELMER E. HERSHEY
Solicitor for Plaintiff
JOHN P. SWEE
Solicitor for Defendants, Alex Pablo and A. M. Sterling

[Endorsed]: Filed February 19, 1938. [354]

Thereafter, on February 21, 1938,

PRAECIPE

of Plaintiff to incorporate in transcript of record additional papers was duly filed herein, being in the words and figures following, to-wit: [355]

[Title of District Court and Cause.]

To the Clerk of the above entitled Court:

On February 10, 1938, I was served by appellants in the above case a copy of a Praecipe which is incomplete.

You will please add to said Praecipe on behalf of appellees the Amended Bill of Exceptions of the United States filed May 7, 1934, and the Amended Bill of Exceptions of Harold L. Ickes, Secretary

of the Interior, filed May 7, 1934, and the Return of Service on the United States, and Request of Harold L. Ickes, Secretary of the Interior, to appear, filed March 21, 1934.

Dated this 14th day of February, 1938.

ELMER E. HERSHEY
Attorney for Plaintiff

Copies to:

Kenneth R. L. Simmons, District Counsel, Billings, Montana,

John B. Tansil, United States Attorney, Butte, Montana.

State of Montana,
County of Missoula—ss.

Elmer E. Hershey, being first duly sworn according to law, deposes and says: That on the 4th day of February, 1938, he served the foregoing upon Kenneth R. L. Simmons, at Billings, Montana, by depositing in the United States post office a full, true and correct copy thereof, secure of seal, postage prepaid, and addressed to Kenneth R. L. Simmons, District Counsel, United States Indian Irrigation Service, Billings, Montana.

ELMER E. HERSHEY

Subscribed and sworn to before me this 14 day of February, 1938.

[Seal] JAS. A. WALSH
Notary Public for the State of Montana.
Residing at Missoula, Montana.

My Commission expires October 21, 1938.

[Endorsed]: Filed Feb. 21, 1938. [356]

Thereafter, on March 9, 1938, Order enlarging time for filing record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit was duly made and entered herein, in the words and figures following, to-wit: [357]

[Title of District Court and Cause.]

ORDER

For good cause appearing it is hereby ordered that the return day of the Amended Citation issued herein on February 11, 1938, and the time for filing the record on appeal in this cause in the United States Circuit Court of Appeals for the Ninth Circuit be enlarged and extended to and including the 11th day of April, 1938.

Dated March 9th, 1938.

CHARLES N. PRAY
United States District Judge for
the District of Montana. [358]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 359

pages, numbered consecutively from 1 to 359 inclusive, is a full, true and correct transcript of all portions of the record and proceedings in case No. 1496, Agnes McIntire vs. United States of America, et al., which have by praecipes been designated to be incorporated into said transcript, (except "Service upon Harold L. Ickes, Secretary of the Interior, of either the first *of* second Amended Bill of Complaint", and except "Motion to Dismiss of Defendant the United States of America", of which there is no record) as appears from the original records and files of said Court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citations issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of $52.60; that $8.00 of said amount has been paid by the Appellant Flathead Irrigation District, and the balance of said costs has been made a charge against the United States.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, the following exhibits introduced and received in evidence at the trial of said cause, to-wit: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 8-a, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32.

Witness my hand and the seal of said court at Helena, Montana, this March 18th, A. D. 1938.

[Seal] C. R. GARLOW,
Clerk.
By H. H. WALKER
Deputy. [359]

[Endorsed]: No. 8797. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al., Appellants, vs. Agnes McIntire, Flathead Irrigation District, a corporation, Alex Pablo, and A. M. Sterling, Appellees. Flathead Irrigation District, a corporation, Appellant, vs. Agnes McIntire, Alex Pablo, and A. M. Sterling, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed March 21, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8797

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Brief of Appellant
FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allan K. Smith
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

Filed .....

Clerk .....

No. 8797

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

Brief of Appellant
FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allan K. Smith
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE PLEADINGS AND BASIS OF JURISDICTION.

This is an appeal from a decree, rendered in a suit in equity brought by the plaintiff, Agnes McIntire, against the defendants, United States of America, Harold Ickes, Secretary of the Interior, Henry Gerharz, Project Manager of the Flathead Reclamation Project, Alex Pablo and A. M. Sterling (the two defendants last named are appellees in this court), Flathead Irrigation District, a corporation, and certain defendants designated as nineteen members of the Flathead Tribe of Indians. The suit was brought for the dual purpose, according to the prayer of the complaint, of (1) partitioning the waters of Mud Creek and quieting plaintiff's title to 160 inches of said water as partitioned, and (2) restraining the defendants from interfering with plaintiff's water right as partitioned and quieted. (R. 81)

An original and one amended complaint was filed prior to the time that the Flathead Irrigation District was made a party. (R. 2 and 60). On May 1, 1936, the amended complaint which made the Flathead Irrigation District a party defendant and which framed the issues upon which the case was tried, was filed, evidently for the purpose of complying with the decision of this court in the case of Moody v. Johnston, 66

Fed. (2d) 999, to the effect that all interested parties must be joined in such a suit. (R. 73)

This complaint alleges the execution and ratification of the Flathead Treaty of July 16, 1855 (12 Stat. L. p. 975), which was proclaimed April 18, 1895, creating the Flathead Reservation; that the Indians were encouraged to abandon their nomadic ways and become civilized people on lands afterward allotted; that the land on the reservation is arid and requires one inch of water per acre for proper irrigation; that the Indians settled on the reservation and are farming the same by use of artificial irrigation. (Comp. Par. I, R. p. 74-75).

That Michel Pablo and Lizette Barnaby, both members of the Flathead tribe, "made allotment" for certain described lands. (Comp. Par. II, R. 75)

That on April 15, 1900, Michel Pablo, by means of a ditch with a capacity of 160 inches, carried water from Mud Creek to the allotments described in Paragraph II of the complaint, and thereby appropriated the 160 inches of water which became appurtenant to the lands. (Comp. Par. III, R. 75-76).

That on January 25, 1918, a fee patent issued to Agatha Pablo, wife of Michel Pablo, covering the Michel Pablo allotment, and that on October 5, 1918, a a fee patent issued to Agatha Pablo covering the Barnaby allotment and that plaintiff subsequently became the owner in fee of the lands and the 160 inches of water appurtenant. (Comp. Par. IV, R. 76).

That Congress passed the Act of June 21, 1906 (34 Stat. L. p. 354) amending the Act of April 23, 1904

(33 Stat. L. p. 302), providing for the allotment of Indian lands and the opening of the same for sale. That from April 15, 1900, to the present date the water from Mud Creek has been used on the lands and that plaintiff claims 160 inches thereof. (Comp. Par. V. R. p. 76)

That no parties other than plaintiff and defendant, United States, are using water; that said parties are joint tenants and that the water can be partitioned. (Comp. Par. VI, R. 77-78)

That defendant Ickes, Secretary of the Interior, claims to be in charge of the Flathead Irrigation Project and that defendant Gerharz claims to be project manager. (Comp. Par. VIII, R. 79).

That defendants are claiming that plaintiff has no right to the waters of Mud Creek and are preventing water from flowing in plaintiff's ditch to plaintiff's damage. (Comp. Par. IX, R. 79)

That the value of the water exceeds the sum of $3,000.00; that this action is necessary to prevent a multiplicity of suits; that plaintiff has no plain, speedy and adequate remedy at law. (Comp. Pars. X, XI XII, R. 79)

That the defendant, Flathead Irrigation District, is a corporation and that all of the defendants make some claim to the waters. (Comp. Pars. XIII, XIV, and XV, R. 79-80).

The prayer asks that the United States be required to set up its interest; that the right of plaintiff be partitioned; that plaintiff be given a prior right of 160

inches and that the defendants be restrained from interfering with plaintiff's water.

The answers filed by the defendants Alex Pablo and A. M. Sterling contain cross-complaints based on substantially the same facts as set forth in the amended complaint and claim an appropriation for both Alex Pablo and A. M. Sterling as successors to portions of the Michel Pablo appropriation. (R. p. 138)

The defendant, Flathead Irrigation District, filed an answer which put in issue the rights of the plaintiff to appropriate water on an Indian Reservation (R. 121), and the plaintiff's ownership of any interest in the water of Mud Creek (R. 122) and which set up the incorporation of defendant district (R. 123), the contracts of the defendant district with the United States (R. 124), and claim of defendant that there is not and never has been a right to take water upon the Flathead Reservation other than through the Flathead Irrigation Project. (R. 125-127).

By stipulation all new matter contained in the answers of all parties was deemed denied without need of a written reply. (R. 335).

The jurisdiction of the district court in this suit is based upon the provisions of the Judicial Code, paragraph 25 (30 Stat. L. 416, 30 Stat. L. 1094, 28 U. S. C. A., section 41, par. 25),providing for partition of lands held in joint tenancy by the United States.

STATEMENT OF THE CASE

As is seen from the plaintiff's complaint herein, the

plaintiff claims by virtue of an appropriation thereof a right to the waters of Mud Creek prior to that of the United States and the remaining defendants. The defendants, Sterling and Pablo likewise claim rights to the waters of Mud Creek by virtue of private appropriations. (Answer of Pablo and Sterling, Tr. 138). The only question which this appellant seeks to review is whether the plaintiff and the defendants Pablo and Sterling are entitled to water from Mud Creek aside from their rights under the Flathead Irrigation Project and if so the nature of those rights.

A. Creation and Purpose of Defendant. Flathead Irrigation District.

The appellant, Flathead Irrigation District, is a public corporation organized under the laws of Montana (Sections 7166 to 7194.8 R.C.M. 1935) for the purpose of cooperating with the United States in the construction of irrigation works and projects and pursuant to the Acts of Congress of May 10, 1926 (44 Stat. 464-466), January 12, 1927 (44 Stat. 945), March 7, 1928 (45 Stat. 212-213), March 4, 1929 (45 Stat. 1574), March 4, 1929 (45 Stat. 1639-1640), and May 14, 1930 (46 Stat. 291) (Tr. p. 270, Def's. Ex. 16) The Flathead Irrigation District, after its creation, entered into contracts with the United States (T. 269-270-328), whereby the said district will upon repayment to the United States become the owner of the Flathead Irrigation Project. Since the appellant irrigation district is under contract to pay for the project, it is vitally interested in the rights of the United States as the present own-

er of the project to the waters of Mud Creek.

B. Creation of Reservation.

The Flathead Indian Reservation was created by the Flathead Treaty executed July 16, 1855 and proclaimed April 18, 1859 (12 Stat. 975) Under the treaty the Flathead Nation ceded to the United States a large tract of land and there was reserved for the "exclusive use and benefit of said tribes as an Indian Reservation" a smaller tract. Section VI of the treaty provided:

> "The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

C. Origin of Rights Claimed by Plaintiff and Defendants Pablo and Sterling.

The record shows that by the year 1891 Michel Pablo, a Flathead Indian was living on what was known as the "Pablo Place" and had dug a ditch taking water from Mud Creek for the land. (R. p. 242) From this ditch the tracts later alloted to Alex Pablo, Agatha Pablo and Michel Pablo and Joe Pablo were irrigated. (R. P. 241) The ditch was so dug that the water could be used on what was later the Barnaby allotment. (R. p. 240). A notice of appropriation dated Nov. 12, 1937,

(apparently an error) claiming 560 inches of water as of April 15, 1900, was admitted over objection. (R. p. 319 Defs. Ex 19).

At the time of the claimed appropriation the reservation had not been opened to settlement and no allotments in severalty had been made. In 1904, Congress by its act of April 23rd, 1904 (24 Stat. L. 302) provided for the survey of the reservation, the allotment of lands in severalty and the sale of surplus unalloted lands. It was stipulated at the trial that no trust patents issued for lands in the Flathead Reservation prior to October 8, 1908 (R. p. 333).

The plaintiff claims as the successor of Agatha Pablo who on January 25, 1918 received a fee patent for the land which had been alloted to Michel Pablo (R. p. 232, Pfs. Ex. 1) and who on October 5th, 1916 received a fee patent for land which had been alloted to Lizette Barnaby (R. p. 234, Pfs. Ex. 2). Plaintiff secured title to these lands on September 25th, 1924 by virtue of a sheriff's deed which issued after the foreclosure of a mortgage. (R. p. 235, Pfs. Ex. 3) The record does not show the chain of title to the lands of Sterling and Alex Pablo except that Alex Pablo testified that he was a ward of the government and owned an allotment (R. pp 315) and it was stipulated that A. M. Sterling is the owner of the South half of the Northeast quarter of Section fourteen, Township twenty-one North, Range twenty West. (This stipulation is apparently incorrect because Sterling in his answer claims the Northwest not the Northeast quarter. This

appellant does not however make any point of this error.) All of the appellees are thus claiming through the appropriation alleged to have been made by Michel Pablo.

D. History of Flathead Irrigation Project.

The Act of Congress, April 23, 1904 (33 Stat. L. 302) which provided for the allotment of lands in severalty to the Flathead Indians, and provided for the sale of surplus unalloted lands, provided in Section 14, for the use of the proceeds of the sale of surplus unallotted lands, in part, as follows:

> "One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, *in the construction of irrigation ditches, the purchase of stock, cattle,* farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect." (Italics supplied)

The report of the Commissioner of Indians Affairs for the year 1907 shows:

> "On April 26, 1907, the Director of the Reclamation Service was asked to make a preliminary investigation on the Flathead Reservation in Montana to enable me to recommend the legislation needed for an adequate system of irrigation for

> the Indians to be allotted and for the lands to be disposed of under act of April 23, 1904. (33 Stat. L. 302) No report has yet been received from him."

(Annual Reports of Department of Interior—Administrative 1907 Volume 2, p. 52). We ask the court to take judicial notice of this report as a public document. The Bureau of Reclamation for the purpose of providing waters for the Indian lands to be allotted and the surplus unalloted lands made a survey in the Flathead area in 1907 and 1908 as shown by the report of the Bureau of Reclamation for that year. (7th Annual Report Reclamation Service p. 100-101, Defendant Flathead Irrigation Dist. Ex. 31, R. 334). The funds for this work were provided by Act April 30, 1908 (35 Stat. L. p. 83) which is as follows:

> "For preliminary surveys, plans and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the act of April twenty-third, nineteen hundred and four, entitled 'An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment,' and to begin the construction of the same, fifty thousand dollars, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation."

Engineer Stockton testified that as a representative of the Reclamation Service he went to the Flathead Reservation in 1907 and made a survey for the purpose of determining the best possible distribution to be made of the natural resources of the reservation (Record p.

253 and Defendants Ex. 8 R. 254). Stockton laid out a system of irrigation and estimated the irrigable acreage (R. p. 255). At that time it was planned to use the waters of Mud Creek, the idea being to take up all the water available and provide as much storage as possible to get the greatest possible useful development of the lands on the reservation. (R. 256) Later the Pablo feeder canal was designed and constructed to conserve the waters of Mud Creek and other small streams. (R. p. 256 and 258).

The Act of Congress of May 29, 1908 (35 Stat. L. 488), amending Section 9 of the Act of April 23, 1904 (33 Stat. L. 302) provided generally for the sale of unallotted lands and the price thereof and also provided for the manner in which purchasers should pay for water rights; the act then provided in Section 9, relative to Indian allotees, as follows:

> "The lands irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. *All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.*" *(Italics supplied.)*

and further provided in Section 14 for the disposal of the proceeds of the sale of surplus lands as follows:

"That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of live stock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians and persons holding tribal rights on said reservation, semi-annually as the same shall become available, share and share alike: Provided, *That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system.*" *(Italics supplied)*

Thereafter and from year to year various measures were passed appropriating money for the construction of the project and the cost to June 30, 1936, was $7,499,105.85 (R. p. 265).

The waters of Mud Creek affect approximately 80,000 acres in the Mission Valley Division, which includes the greater portion of the Flathead Irrigation District. (R. 262, 265-266) These waters are used upon lands which had no water prior to the construction of the

system (R. 330) and even with the waters of Mud Creek there is a shortage of water for the lands under the project. (R. p. 259, 329, 332).

E. The Recognition by the United States of Private Rights

The record shows certain acts of the Secretary of the Interior recognizing private water rights on the reservation. (R. 271 to 293, and 295 to 296, also R. 296 to 310.) This appellant raises no question with respect to these rights and any extended discussion of them would simply reiterate matters contained in the brief of the United States and other appealing defendant. The defendants claim apart from the rights adjudicated by the Secretary of the Interior and it is with the rights claimed in excess of those granted by the department that this appellant is concerned.

F. Duty of Water and Abandonment.

There is considerable evidence in the record with respect to the duty of water and the bandonment of the rights of plaintiff and defendants Sterling and Pablo. However, since these matters are urged by the United States and since this appellant is concerned only with the broader question of law involved we assign no error in this court with respect to the findings of the court on duty of water and abandonment and will refrain from setting forth the facts relative thereto.

G. Rights of the Plaintiff and Defendants Within the Irrigation System.

The record shows that the lands of appellees are classified as irrigable and lie within the Flathead Irriga-

tion District and have been assessed with operation and maintenance charged by the United States (R. 294, 295). However, no demand has been made by plaintiff for water from the system (R. 264) though plantiff's lands could be supplied within a short time (R. 262, 263).

The questions raised by this appeal are

1. Whether the plaintiff or the defendants Pablo and Sterling have any private rights on the Flathead Reservation *prior to the rights of the United States,* and other than those decreed by the Secretary of the Interior, and
2. Whether the plaintiff and the defendants Pablo and Sterling have any rights to take water from Mud Creek (other than those adjudicated by the Secretary of the Interior) except through the Flathead Irrigation Project.

SPECIFICATIONS OF ERROR

The assigned errors which are to be relied upon are:

ARGUMENT

SUMMARY OF ARGUMENT.

(Note: When in this arguement appellant refers to

private rights, it refers only to those which are claimed apart from the adjudication of the Secretary of the Interior).

I. That it has never been possible to create water rights, with a date of priority, on the Flathead Indian Reservation, under the doctrine of prior appropriation for:

A. The Flathead Treaty reserved the lands and waters of the reservation for the Indians.

1. The reservation of lands and waters was for the Indians as a tribe, not as individuals.

B. The United States thereupon became the trustee of said lands and waters for the benefit of the Indians as a tribe.

C. There has never been a law under which water rights could be created on the Flathead Reservation by appropriation.

1. The State Law of appropriation did not apply.
2. There is no law of the United States creating such rights, Section 19 of the Act of June 21, 1906 (34 Stat. L. 354) being a mere saving clause and inoperative to create rights.
3. The idea of prior appropriation is repugnant to any theory of equitable treatment of the Indians on a reservation.

II. There is no right in plaintiff or appellee defendants to take any water from the streams on the reservation except as such parties would be entitled to water from the Flathead Irrigation Project. (We contend that the doctrine of U. S. vs. Powers

et al (16 Fed. Supp. 155, affirmed 94 Fed. (2) 783) cannot be applied to the Flathead Reservation.)

A. The record here shows that the appellees could get water from the project system.

B. The United States, which sustained to the Indians the guardian and ward relationship, had plenary power to provide for the distribution of the waters of the reservation so as to provide the greatest good for the greatest number, and the method designated by the United States is the exclusive method.

C. The United States has indicated that rights to water be obtained only through the project system.

D. This did not disturb any vested rights because the lands were made subject to the system before any private rights attached to the lands.

E. The system provided is the most equitable which could be devised.

I. IT HAS NEVER BEEN POSSIBLE TO CREATE WATER RIGHTS WITH A DATE OF PRIORITY UPON THE FLATHEAD INDIAN RESERVATION, UNDER THE DOCTRINE OF PRIOR APPROPRIATION.

Assignment Error No. II (R. p. 358)—The court erred in entering judgment against the defendant, Flathead Irrigation District.

Assignment Error No. IV (R. p. 358)—The Court erred in holding that the waters of Mud Creek are now, or ever have been, subject to private appropriation

by the plaintiff, Agnes McIntire, or by the defendants, Alex Pablo and A. M. Sterling.

Assignment of Error No. V (R. p. 359)—The Court erred in holding that the rights of the plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, to the use of the waters of Mud Creek are prior to the rights of the United States and the defendant, Flathead Irrigation District.

Assignment of Error No. VII (R. p. 359)—The Court erred in holding that the right to the use of the waters of Mud Creek for irrigation became appurtenant to the lands now owned by plaintiff, Agnes McIntire, and the defendants, Alex Pablo and A. M. Sterling, by reason of an appropriation of said waters by the predecessors in interest of the plaintiffs and of said defendants.

Assignment of Error No. IV (R. p. 360)—The court erred in holding that the maintenance of a dam in Mud Creek by the defendant, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are deprived of the use of the waters of Mud Creek, is unlawful.

If it be established that there can be no rights created on the Flathead Reservation by prior appropriation, then it is clear that the court erred in entering judgment against the Flathead Irrigation District, (R. 225) in holding that the waters of Mud Creek were sub-

ject to appropriation by plaintiff and defendants Pablo and Sterling (R. 175, 210, 216, 218) in holding the rights of respondents to be prior to the rights of the United States (R. 171), in holding the waters of Mud Creek to be appurtenant to the lands of respondents (R. 210, 216, 218), and in holding that the maintenance of a dam by the United States is unlawful. (R. 225).

A. THE FLATHEAD TREATY RESERVED THE LANDS AND WATERS OF THE RESERVATION FOR THE BENEFIT OF THE INDIANS.

By Section 1 of the treaty of July 18, 1855 (12 Stat. p. 975, 2 Kappler 542), the Flathead nation ceded to the United States a large section of territory, and by Section 2 of the treaty reserved for the use and occupation of the Indians a smaller area, for the "exclusive use and benefit of said confederated tribes as an Indian Reservation." It is clear from all the authority on this subject that the waters as well as the lands were impliedly reserved for the benefit of the Indians.

Winter v. United States, 207 U. S. 564, 28 Sup. Ct. 207, 52 L. Ed. 340.

It is not questioned but that the waters were reserved for the Indians, but there is confusion as to the meaning of the term "Indians." Does the word refer to the tribe or does it refer to the individual members of the tribe?

1. THE RESERVATION WAS FOR THE BENEFIT OF THE INDIANS AS A TRIBE AND NOT AS INDIVIDUALS.

In U. S. v. Powers et al (16 F. Supp. 155), the Dis-

trict Court held that under the Crow Treaty the reservation was for the benefit of the Indians as individuals. Whether the proposition was there correctly decided is not necessary to a decision here for it is clear that under the Flathead Treaty a different result must obtain.

The Flathead people were not living upon the present reservation at the time of this treaty. They were living in the general area of the Bitter Root Valley in Montana. This is shown by the terms of the treaty itself. In Article 2 of the treaty the Indians agree to move to the reservation within one year after the ratification of the treaty. The treaty further provided for the appraisal of the improvements of the Indians who, on moving, had to abandon the same. It also contains a provision for the payment of certain money to compensate the Indians for moving to the reserved land. The treaty of 1855 did not definitely fix the reservation at least so far as the Flatheads were concerned. Article II of the treaty provided that if upon a survey it should be decided that the Bitterroot Valley was better suited to the needs of the tribe than the general reservation then portions of the Bitterroot should be set aside as a reservation. The question was not settled until the proclamation of President Grant in 1871.

Northern Pac. R. Co. v. Maclay, 61 Fed. 554.

Northern Pac. R. Co. v. Hinchman, 53 Fed. 523.

It is indeed difficult to see how the Indians who were not living on the lands now in question could have had any rights in severalty to either the lands or waters.

At the time of the Treaty the lands here involved were not even occupied by the Flatheads. Even if we assume that the waters were appurtenant to the lands no right to water could vest in an individual prior to the time that the individual secured some rights in the land.

Article 6 of the treaty, the provisions of which are as follows:

> "The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

clearly shows that the reservation was for the tribe. Any ownership in severalty was expressly deferred subject to the discretion of the President. Not until after a survey and allotment could an individual right accrue. The survey and allotment was not provided for until the Act of April 23, 1904 (33 Stat. L. 302.) It is clear therefore from the provisions of the treaty that at the time of the treaty the waters were reserved for the tribe. Apart from ownership in lands in severalty there could be no right to water in severalty and since the treaty created a common ownership of the land there was necessarily created a common ownership of the water. At this point we call the court's attention to Article 6 of the Treaty with the Omahas (10 Stat. L.

1043, 2 Kappler 453), referred to in Article 6 of the Flathead Treaty. Article 6 of the Omaha Treaty does not change the situation so far as the question of severalty or common ownership is concerned.

B. THE UNITED STATES BECAME TRUSTEE OF THE LANDS AND WATERS FOR THE BENEFIT OF THE INDIANS AS A TRIBE.

Since the case of Johnson v. McIntosh (8 Wheat. 543, 5 U. S. (L. Ed.) 681), it has been unifromly held that the fee title to all of the lands in the Louisiana Purchase is in the United States, subject only to the right of occupancy in the Indians. (25 R. C. L. 123) However, upon the ratification of the Flathead Treaty, the United States became a trustee for the Indians of the lands and waters in the reserevd area. Whatever may have been the obligation of the United States with respect to the title held for the Indians, it is clear that the title to the land and water was in the United States. In saying this we do not disagree with the language in the case of U. S. v. Powers et al, (94 Fed. (2) 783, at page 785,) where the court said:

> "There was in the treaty no express reservation of water for irrigation or other purposes. There was, however, an implied reservation. Winters v. United States, 207 U. S. 564, 575, 28 S. Ct. 207, 52 L. Ed. 340. The implied reservation was to the Indians, not to appellant. Skeem v. United States, 9 Cir. 273 Fed. 93, 95; Conrad Investment Co. v. United States, 9 Cir., 161 F. 829, 831; Winters v. United States, 9 Cir., 143 F. 740, 745, affirmed in 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340."

But we do insist that the reservation to the Indians

vested in the United States as trustee for the Indians. We do not contend that the United States, as a sovereign, held unto itself this title, but we do claim that the United States as guardian of the Indians, held this title after the execution of the treaty.

In the case of Minnesota v. Hitchcock, (185 U. S. 373, 46 L. Ed. 954, 22 S. C. 650) the Supreme Court considered the question of the title of the United States to lands in an Indian Reservation, and said:

> The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.
>
> But, it may be said, that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone up the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion. But Congress has, for the Government, assumed a personal responsibility."

In the case of Cherokee Nation v. Hitchcock, (187 U. S. 294, 47 L. Ed. 183, 23 S. C. 115) it was held that the United States as guardian of the property of the Cherokee Nation might make leases of the unallotted lands of the Cherokees for oil and gas. The court said:

> The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.
>
> The holding that Congress had power to provide

a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. The Cherokee Trust Funds, 117 U. S. 288, 308. The manner in which this land is held is described in Cherokee Nation v. Journeycake, 155 U. S. 196, 207, where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.'

There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

In United States v. Richert, (188 U. S. 432, 47 L. Ed. 532, 23 S. C. 478) the Supreme Court, held that the State of South Dakota had no power to tax lands to which trust patents had issued, and in so holding said:

"These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have

> not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficient objects with reference to a race of which this court has said that 'from their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.' "

We cite this case for the limited purpose of showing that the United States hold as trustee for the Indians.

In Lone Wolf v. Hitchcock, (187 U. S. 553, 47 L. Ed. 299, 23 S. C. 216) the Supreme Court held that the United States had power to sell surplus lands contrary to the provisions of a treaty.

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . .
>
> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in Cherokee Nation v. United States, 119 U. S. 1, 27, and Stephens v. Cherokee Nation, 174 U. S. 445, 483."

The entire history of Indian litigation and legislation assumes the title to be in the United States. The very manner in which the trust and fee patents are issued precludes any other theory. And it must follow, as the night the day, that if the Government held the title to the reserved land it likewise held title to the reserved waters.

We stress this seemingly obvious point because upon a proper consideration of it depends the entire question of Indian reservation waters.

C. THERE HAS NEVER BEEN A LAW BY WHICH A WATER RIGHT COULD BE CREATED BY APPROPRIATION ON THE FLATHEAD RESERVATION.

Since the title to the waters remained in the United States, a right to water could necessarily be secured only from the United States under some law authorizing such a right. There has never been enacted such a law.

1. The state laws do not apply.

The case of Winters v. U. S. (207 U. S. 564, 52 L. Ed. 340, 28 S. C. 207) is authority for the proposition that the United States had the power to reserve the waters from private appropriation. And that decision determines that waters needed for the reservation cannot be appropriated for use outside the reservation.

A right in persons within the reservation to appropriate water under State Law was never recognized by Congress. The enabling act of the State of Montana expressly provides:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States."

Act of Congress, Feb. 22, 1889 (25 Stat. 676, Vol. 1 R. C. M. 1935, p. 60)

The Act of Congress of July 26, 1866, C 262, Sec. 9 (14 Stat. 243, 43 U.S.C.A. 661) which recognized the doctrine of prior appropriation, where the same existed by local custom applied only to the *public* lands and waters of the United States.

Winters v. U. S., 143 Fed. 740, at page 747;

Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761;

Smith v. Deniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408;

Cruse v. McCauley (C C) 96 Fed. 369.

Lands reserved for an Indian Reservation were not public lands.

In Northern Pac. R. Co. v. Maclay, (61 Fed. 554,) it was held that the lands in the Bitterroot Valley mentioned in Section 11 of the Flathead Treaty of 1855 were not public land. The court said:

> "From the agreed statement of facts, it affirmatively appears that the lands in question, in the

> Bitter Root valley, above the Lolo Fork, in the state of Montana, were not public lands of the United States at the date of the passage of the 'Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Pugent Sound on the Pacific coast by the northern route, approved July 2, 1854.' "

The United States Supreme Court held that lands reserved to the use and benefit of the Indians were not public lands in the case of Leavenworth, etc. R. R. Co. v. U. S., (92 U. S. 733, 23 L. Ed. 634,) saying:

> "We go further, and say, that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, proclamation, or sale would be construed to embrace or operate upon it, although no reservation were made of it. It may be urged that it was not necessary in deciding that case to pass upon the question; but, however, this may be, the principle asserted is sound and reasonable, and w eaccept it as a rule of construction. The supreme courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. State v. Delesdenier, 7 Tex. 76; Spaulding v. Martin, 11 Wis. 274. It applies with more force to Indian than to military reservations. The latter are the absolute property of the government."

Our point here is simply this: In order that the state laws apply to water on an Indian Reservation, it is necessary that there be some authority from the United States recognizing the applicability of such laws and as we have seen there is no such Federal law.

This was settled in U. S. v. Rio Grande Irrigation

Company, (174 U. S. 690, 702, 19 Sup. Ct. 770, 43 L. Ed. 1136) where the court said:

> "Although this power of changing the common-law rule as to streams within its dominion undoubtedly belong to each state, yet two limitations must be recognized: First. That, in the absence of specific authority from Congress, a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far at least as may be necessary for the beneficial uses of the government property. Second. That it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

2. There is no law of the United States under which rights could be created by private appropriation.

The Federal Government did not authorize the creation of rights under state law nor did the federal government ever by its own enactment create or recognize the doctrine of appropriation independently of state law.

Section 19 of the Act of Congress of June 21, 1906 (34 Stat. 354) has been consistently relied upon as authority for the appropriation of the waters of the Flathead. The respondents all reply upon it. (R. 77 and 146) And Judge Pray relied upon it in rendering his decision in this cause (R. 160) The Act in question reads:

> "That nothing in this act shall be construed to deprive any of said Indians, or said persons or

> corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use of any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

It is apparent that Section 19 is a saving clause and nothing more.

See Shutt v. State, (173 Ind. 689 at 692, 89 N. E. 6,) where it is said:

> "There is no particular rule for its location, or its verbal form; but it is generally near or at the end, commencing, 'Nothing in this act shall,' "

Its purpose was to save such rights as existed and not to create any rights. The clause operates only in restrospect and did not purport to create or provide a method for creating rights in future.

As a saving clause it could not operate to create rights. The rule with respect to a saving clause is well stated in Knickerbocker Ice. Co. v. Stewart, (253 U. S. 149 at page 162, 64 L. Ed. 834, 40 S. C. 438) in these words:

> "The usual function of a saving clause is to preserve something from immediate interference—not to create; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it. Endlick, Interpretation of Statutes, Sec. 372."

See also 59 C. J. 1093, as follows:

> "A saving clause is an exception of special things out of the general things mentioned in the statute; something smaller than the thing itself, and yet not nullifying it. Its usual function is

not to create anything, but to preserve something from immediate interference***"

A reference to the proceedings in Congress with respect to Section 19 discloses that it was not the intent of Congress to create a right to appropriate water. After the bill H. R. 15331 of the 59th Congress, First Session, had passed the House, the sections relating to townsites were added to the Act by amendment on the floor of the Senate (Cong. Rec. Vol. 40, p. 6036). The matter was the subject of some debate which discloses no evidence of any intent to create any water right or to extend the laws of the State relating to appropriation to Flathead lands.

At the time of the enactment of Section 19, neither the Winters case nor the Conrad case had been decided. It would be quite natural for Congress to insert a saving clause that would say no more than that the legislation was not intended to alter or change the rights of parties who were using water from the streams on Indian Reservations. That is the usual purpose of a saving clause, as pointed out in the Knickerbocker case heretofore cited.

As a matter of fact, reference to the Congressional Record will show that during the debate on the Act in which this section is included there was some discussion of the Conrad case and one amendment offered was designed to compel a dismissal of that action. Reference may be had to that debate and to the amendment which was not adopted (and which would also have made Montana appropriation laws apply to the Black-

feet Reservation) by an examination of Volume 40, Congressional Record, pp. 5811-5813.

Reference to that proposed amendment, never adopted, shows clearly that it was understood by the members of Congress, first, that without special enactment Montana laws relating to appropriation would not apply and, second, that the final outcome of the Winters and Conrad cases was unknown, which would explain the insertion of a saving clause in the pending legislation.

Since Section 19 was a saving clause, the question then arises, what, if anything, did it save? The answer is nothing. Since at the time of the enactment of Section 19, which was in 1906, there were no rights in severalty either in trust or fee on the reservation, how could it be said that any person could have appropriated water for his land? How could water have become appurtenant to private land when there was as yet no private ownership of land? Until after the trust patents issued which was not prior to October 8, 1908, no Indian had a vested right to any particular land, the whole being in the United States for the benefit of all. We therefore urge that Section 19 did not and could not save any prior rights because there were none to save.

Even if there had been private rights to land at the time of the passage of Section 19, the result would be no different for the reason there was no law prior to that time, as we have pointed out, under which rights to water by prior appropriation could be initiated. In the absence of the consent of the United States no

individual could obtain a right hostile to its ownership of the waters, as trustee of the entire tribe. In order to find that Section 19 saved any rights, it is first necessary to find the rights, and in order to find such rights it is necessary to hold that Indians who had no private ownership of lands were able, without the consent of the United States to divest the United States of its title as trustee, to water, and then in some way affix that divested title as a private appurtenance to land still owned by the United States as trustee.

The Acts of Congress which governed the lands on reservations prior to the Act of June 21, 1906, not only did not recognize prior appropriation as the law of the reservation, but indicated that prior appropriation was not to be the rule.

The General Allotment Act of 1887 (24 Stat. L. 388) provided in Section 7:

> "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

It is clear from this act that Congress intended that the rule of equality should govern on reservations, and for the purpose of providing equality the Secretary was authorized to make rules and regulations. Wheth-

er such rules and regulations were provided is not important here for we are concerned only with the intent of Congress to make equality the rule. The act then goes on to say that *no other appropriation or grant of water by a riparian appropriater shall be authorized or permitted to the damage of any other riparian proprietor.* The words *"no other appropriation"* must refer back to *"just and equal distribution"* and consequently any appropriation which gave an Indian a greater quantity of water or an earlier priority than others was clearly unlawful. It is true that the statute uses the word "riparian," but since all the land was in one ownership on the Flathead until 1908, the land was all riparian. Further it could not have been the intent of Congress to provide a *"just and equal distribution"* among riparian owners and to allow non-riparian owners to go without, particularly in view of the fact that Congress said *"just* and *equal* distribution", which must necessarily comprehend *all* the Indians living on the reservation. The whole theory of prior appropriation is contrary to the theory of just and equal distribution and is therefore contrary to Section 7 of the General Allottment Act.

3. The idea of a prior appropriation on an Indian reservation is repugnant to any theory of equitable treatment of the Indians.

We believe that the court should lean away from any construction of the acts of Congress which could possibly lead to a right of prior appropriation on an In-

dian reservation. It is to be presumed that the United States intended to treat the Indians equally, insofar as possible. The Indians are a nomadic, not an agricultural people. At the time of the creation of the reservation few, if any, of the Indians could have known of irrigation and most probably none were interested in it.

If the United States adopted the rule of prior appropriation for the Flathead Indian Reservation, then the intent of the United States was to:

1. Prefer those Indians who through their white blood, association with whites or superior intelligence were smart enough to get lands and put water on them to the exclusion of their less advanced fellows and,
2. Allow those Indians fortunate enough to locate on or near a stream to acquire rights to the exclusion of those having irrigable lands a few miles from a water source.

As a trustee for all, it was the obligation of the United States to see that an Indian acquired no more of the common property than another. If the United States permitted private appropriation by an Indian as against another, then it was guilty of a gross injustice to the less advanced Indian and to the Indian who lived away from the water and could not possibly for economic reasons build the necessary ditches to convey the water. The United States did not intend to throw these untutored and uncivilized people into competition with each other for valuable water rights and every presumption should avail against any language used

by Congress (we still assert there is none) which would tend to permit the doctrine of prior appropriation. All of this is particularly obvious when it is considered that the Acts here referred to contemplated that Indian allottees might receive fee patents and dispose of their lands to white purchasers. Inevitably these purchasers would acquire the lands first irrigated, with the result that white purchasers would soon have all the water and the neighboring Indian owners would have none. Is it not significant here that three of the four private water rights claimed are in white ownership?

II. THERE IS NO RIGHT IN PLAINTIFF OR APPELLEE DEFENDANTS TO TAKE ANY WATER FROM THE STREAMS ON THE RESERVATION EXCEPT AS SUCH PARTIES ARE ENTITLED TO WATER FROM THE FLATHEAD IRRIGATION PROJECT.

Assignment of Error No. III (R. 358)—The Court erred in holding in effect that the plaintiff, Agnes McIntire, and the defendants, The United States of America, Alex Pablo and A. M. Sterling, are tenants in common or joint tenants in the use of the waters of Mud Creek.

Assignment of Error No. IX (R. 360)—The Court erred in holding that the maintenance of a dam in Mud Creek by the defendants, Henry Gerharz, acting for the defendant, The United States of America, as Engineer and Project Manager of Flathead Reclamation Project, by which dam the plaintiff and the defendants, Alex Pablo and A. M. Sterling, are

deprived of the use of the waters of Mud Creek, is unlawful.

If the respondents are entitled to an amount of water equal in time and amount to each other Indian allottee or his successor under the doctrine of the case of United States v. Powers (16 Fed. Supp. 115, affirmed 94 Fed. 2d. 783), then perhaps the lower court was correct in determing that the parties were tenants in common of the water and in enjoining the United States from interfering with a flow to the respondents' lands. That is, even though the court find that the doctrine of appropriation did not apply, still it may have correctly enjoined the United States from interfering with what water respondents were entitled to under the Powers case.

It is our purpose to demonstrate that the Powers case should not apply to the Flathead Reservation.

A. THE RECORD SHOWS THAT THE APPELLEES COULD GET WATER FROM THE PROJECT SYSTEM.

There is no claim made that the respondents here have been prevented from taking water from the project system or that upon payment therefore they could not get water from the system. The record shows that they could get the water within a very short time. (R. 262-263) The question of what the rights of the parties would be if the system were not able to deliver water does not arise. The only question is, can respondents who are able to secure water from the system

take any water apart from the system? We contend that they can not.

B. THE UNITED STATES, WHICH SUSTAINED TO THE INDIANS THE GUARDIAN AND WARD RELATIONSHIP, HAD PLENARY POWER TO PROVIDE FOR THE DISTRIBUTION OF THE WATERS OF THE RESERVATION SO AS TO PROVIDE THE GREATEST GOOD FOR THE GREATEST NUMBER, AND THE METHOD DESIGNATED BY THE UNITED STATES IS THE EXCLUSIVE METHOD.

As we have seen, the United States had title to all the lands and waters as trustee for the Indians. As such trustee the United States had plenary power to provide a method of distributing the waters of the reservation *(at least prior to the time that vested rights in severalty accrued to the Indians.)*

We are not here concerned with the question of what the United States could do with these communal lands as against the Indians, although it might be contended that the government could convey to third persons.

Beecher v. Weatherby, (95 U. S. 517, 24 L. Ed. 440) We are concerned with what the United States could do with these lands in regulating the rights of the Indians *inter sese.* As to the latter the United States had an absolute power to determine the method in which the communal lands were to be handled for the benefit of the tribe.

In Lone Wolf v. Hitchcock, (187 U. S. 553, 47 L. E.

299, 23 S. C. 216) the United States was held to have power to sell surplus unalloted lands for the benefit of the tribe contrary to the provisions of a treaty providing that the lands should not be sold without the consent of a certain proportion of the Indians.

The court, in Cherokee Nation v. Hitchcock, (187 U. S. 294 47 L. Ed. 183, 23 S. C. 115)) in addition to the language quoted on page 21 of this brief, said:

> "The decision in Stephens v. Cherokee Nation, 174 U. S. 445, is particularly in point, as that case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed."

Certainly the power exercised by the United States in the above case, the exercise of which was sustained by the court, was a plenary power.

In Stephens v. Cherokee Nation, (174 U. S. 445 43 L. Ed. 1041, 19 S. C. 722) the Supreme Court held that the United States had power to determine the membership of a tribe for the purpose of adjusting rights in communal property. Certainly if the United States has power to determine which of the members of a tribe are entitled to share in communal property, it has suf-

ficient power to determine how the communal waters shall be applied to the tribal lands.

In Gritts v. Fisher, (224 U. S. 640, 56 L. Ed. 928, 32 S. C. 580) the Supreme Court sustained an Act of Congress allowing children of the Cherokee tribe to share in the communal property even though a prior act had indicated that such children were not eligible.

> "But it is said that the act of 1902 contemplated that they alone should receive allotments and be the participants in the distribution of the remaining lands, and also the funds, of the tribe. No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when 'it is only an act of Congress and can have no greater effect.' Cherokee Intermarriage Cases, 203 U. S. 76, 93. *It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.*"

The Supreme Court here held that the United States might diminish, by allowing additional persons to share, the interest of Indians in tribal property and funds. If the United States has power to actually decrease the individual rights to tribal property it cannot be doubted that it may regulate the use of tribal waters and provide a method for the distribution thereof.

The doctrine has been approved and followed.

Tiger v. Western Investment Co., (221 U. S. 286 55 L. Ed. 738, 31 S. C. 578).

Williams v. Johnson, (239 U. S. 414, 60 L. Ed. 358, 36 S. C. 150).

Consequently we say that prior to October 3, 1908, the time when trust patents created some rights in severalty, the power of the United States was full and complete. The question therefore is not, What power did the United States, but *how did it exercise that power?*

C. THE UNITED STATES HAS INDICATED THAT RIGHT TO WATER BE OBTAINED ONLY THROUGH THE PROJECT SYSTEM.

In the Act of Congress of February 8, 1887 (26 Stat. 794, 25 U.S.C.A. 331), Congress indicated that it would provide irrigation projects for Indian lands.

> "And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the number of acres of non-irrigable grazing land***"

The language quoted shows that the amount of an individual allotment was to be governed by the consideration of whether the land was irrigable.

In 1904 Congress by the Allotment Act for the Flathead tribe (33 Stat. L. 302) indicated that communal funds should be used to build an irrigation system. Pursuant to this act the Indian office asked the Bureau of Reclamation to make the preliminary surveys. (See this brief p. ..... and R. 252 and 255). Stockton's party made the first survey in 1907 and included the waters of Mud Creek in their plans. (R. 252 and 253). Then on May 29, 1908, by an Act amending the Act of 1904 (35 Stat. L. 488), Congress definitely said that the lands on the reservation should be subject to the system provided. This law is so important that we will at the risk of repetition set it out again:

> "The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. *All lands allotted to Indians* shall bear their pro rata share of the cost of the operation and maintenance of the *system under which they lie.*" *(Italics supplied)*

The words "the land irrigable under the systems*** alloted to the Indians in severalty *** shall have a right to so much water *** without cost to the Indians for the construction of such *** systems," shows that Congress intended water rights to be acquired *through* the system. The contention is further strengthened

by the provision that "all lands allotted to Indians shall bear their pro rata share of the cost,etc." The act does not say part of the lands, does not say such lands as are not susceptible to private irrigation, it says *all lands*. The further language "may withhold from *any* Indian a sufficient amount of his pro rata share to pay all charge against land held in trust for him, etc." points to the congressional intention that all should profit by and all bear the expense of the operation and maintenance of the system. If Congress intended that all land should pay for the operation and maintenance of the system it intended that all land should be benefited by the system. Since the Act of 1908 Congress has spent some seven and a half million dollars on this system.

Let us point out again that apart from the acts giving rights under the system, there is no act giving rights. Congress in Section 7 of the General Allotment Act said that the Secretary should make rules to provide for the equal distribution of the water, but it likewise indicated that it was not within the province of the individual to create for himself any rights.

It was not necessary that Congress appropriate this water. The title was in the United States so long as the land remained in communal ownership. Since Congress did indicate the method of distribution of the water and did not in any way provide that there should be any other method, it follows that the method provided by the United States is exclusive. Title was in the United States and before any person can successfully

assert any individual title he must point out the statute under which the United States consented that that title might originate.

United States v. Rio Grande Irrigation Company (174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136).

D. THIS DID NOT DISTURB ANY VESTED RIGHTS BECAUSE THE LANDS WERE MADE SUBJECT TO THE SYSTEM BEFORE ANY PRIVATE RIGHTS ATTACHED TO THE LANDS.

Congress did not impair any vested water rights by the Act of May 29, 1908 (35 Stat. L. 448) above set out. We have argued at length that the United States had plenary power over the communal property prior to the vesting of private rights and since that power was exercised on May 29, 1908, which was about six months prior to the issuance of the trust patents which issued not earlier than October 8, 1908 (R. 333), no vested rights were involved.

We do not quarrel with the rule stated in U. S. vs. Powers, 16 Fed. Supp. 155, at page 162 as follows:

> "In Morrow v. U. S., 243 F. 854, 856, the Circuit Court held: 'There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter.' "

The point is that the United States exercised its power over these waters before any private rights vested. Nor do we quarrel with the rule that a conveyance of lands with appurtenances conveys the water rights used to irrigate the lands (U. S. v. Powers, 16

Fed. Supp. 155 at 162), but we do say that a conveyance of land with appurtenances conveys only such rights as were appurtenant at the time of the conveyance. Hence the question here is not, does the word "appurtenance" pass the water rights, but rather, what waters were appurtenant?

Since at the time Michel Pablo took his trust patent the United States had already limited his right to use waters to a use through the system, the word "appurtenance" passed only such limited right and the United States in now asserting that the successors of Michel Pablo take their water through the system *is not attempting to alter any rights that Pablo ever had* but is simply insisting that his successors be content with the rights which Pablo had.

E. THE SYSTEM PROVIDED IS THE MOST EQUITABLE WHICH COULD BE DEVISED.

The insistance of the United States that water be taken only through the system is in furtherance of the policy that the Indians should be treated alike. In the decisions upon this subject the sympathy of the courts for the Indian is quite evident. That is particularly true of the decisions of Judge Bourquin in the Moody litigation. (Scheer v. Moody, 48 Fed. (2) 327). Whatever we may think of the treatment accorded the Indian in days past, we correct no injustice by establishing a rule of law which creates inequality among the Indians themselves.

The Flathead reservation is arid and big. Streams

course through it at various points. Of the many thousand acres on the reservation very few acres are riparian to the streams, or near enough to make private ditches economically feasible for individual owners of allotments.

Some irrigable lands on the reservation may be irrigated by 100 yards of ditch; other require five miles of ditch. Congress never did say "Lone Wolf, by a fortunate change you got land within 100 yards of water, you take the water, but Black Eagle, the gods did not favor you, your land is five miles from water and if you want it you pay for the operation and maintenance of the ditch that takes it there, without help from the lucky Lone Wolf." Congress said, "You will all take your water from the system and you will all pay your pro rata share." Congress tried to create an equitable system and we believe that the courts should engage in every legitimate presumption to make that system effective. In the absence of a clear congressional intent the courts should not say that rights come into existence which result in a gross inequality.

It is perhaps immaterial that an irrigation project is the only method whereby an equitable distribution of water can be effected. If the court decides that each allottee or successor is entitled to a share of water without regard to the system, and if each allottee starts to take his water, all of the water masters in Western Montana cannot secure a just distribution. The amount of water to which McIntire on Mud Creek is entitled depends on the amount of water not only in Mud Creek

but in every creek in the whole Mission Valley. Only through a central system which collects and distributes all the water can the needs of the land (some 80,000 acres, R. 327) and the available water supply be determined. This factor should be of some weight in determining whether Congress did or did not intend that all Indians should take through the system.

We again call to the court's attention the fact that we are not here concerned with

1. The rights of those for whom the system is not available, or

2. The amount or propriety of various charges for the use of water.

The sole question is, do these parties have rights apart from the system? We humbly submit that they do not.

CONCLUSION

The questions here involved are of major importance to thousands of individuals owning lands on Indian reservations. They involve to some extent the value of irrigation projects costing many millions of dollars. We humbly ask that the whole matter of water rights as between the allottees represented by the systems and those fortunate enough to be located near stream be examined, and that if in the light of fundamentals the dectum U. S. v. Powers, 94 Fed. 2d 783 be found

to be erroneous, that it be withdrawn or in any event be not applied to this litigation.

Respectfully submitted,

Walter L. Pope,
Russell E. Smith,
Allan K. Smith,
Attorneys for Appellant
Flathead Irrigation District.

No. 8797

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, LOU GOODALE BIGELOW KROUT, ALPHONSE CLAIRMONT, FLATHEAD IRRIGATION DISTRICT, A CORPORATION, ALICE CLAIRMONT, HENRY CLAIRMONT, GRACE CLAIRMONT, B. D. LIEBEL, PETER OLIVER DUPUIS, MARY PABLO, CHAS. FERGUSON, FRED & EMIL KLOSSNER, EMANUEL HUBER, JOSEPH A. PAQUETTE, FRED C. GUENZLER, ANNIE RAITOR, CLARENCE BILILE, ALEX SLOAN, JACOB M. REMIERS, ADMINISTRATOR OF THE ESTATE OF R. W. JAMISON, DECEASED, GEORGE SLOANE, HATTIE ROSE SLOAN HASTINGS, HELGA VESSEY, E. B. HENDRICKS, LILLIAN CLAIRMONT THOMAS, EUGENE CLAIRMONT, EDWIN DUPUIS, GERTRUDE E. STIMSON, W. B. DEMMICK, ROSE ASHLEY, HENRY ASHLEY, AND W. A. DUPUIS, APPELLANTS

v.

AGNES MCINTIRE, ALEX PABLO, AND A. M. STERLING, APPELLEES

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, AND THE ABOVE NAMED INDIVIDUAL APPELLANTS

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 8797

United States of America, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, Lou Goodale Bigelow Krout, Alphonse Clairmont, Flathead Irrigation District, a Corporation, Alice Clairmont, Henry Clairmont, Grace Clairmont, B. D. Liebel, Peter Oliver Dupuis, Mary Pablo, Chas. Ferguson, Fred & Emil Klossner, Emanuel Huber, Joseph A. Paquette, Fred C. Guenzler, Annie Raitor, Clarence Bilile, Alex Sloan, Jacob M. Remiers, Administrator of the Estate of R. W. Jamison, Deceased, George Sloane, Hattie Rose Sloan Hastings, Helga Vessey, E. B. Hendricks, Lillian Clairmont Thomas, Eugene Clairmont, Edwin Dupuis, Gertrude E. Stimson, W. B. Demmick, Rose Ashley, Henry Ashley, and W. A. Dupuis, appellants

v.

Agnes McIntire, Alex Pablo, and A. M. Sterling, appellees

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES, HAROLD L. ICKES, SECRETARY OF THE INTERIOR, HENRY GERHARZ, PROJECT ENGINEER OF THE FLATHEAD IRRIGATION PROJECT, AND THE ABOVE NAMED INDIVIDUAL APPELLANTS

STATEMENT OF THE PLEADINGS AND BASIS OF JURISDICTION

This action is akin to *Moody* v. *Johnston*, 66 F. (2d) 999, 70 F. (2d) 835, which was recently dismissed by this Court for want of necessary parties. It was brought by the appellee, Agnes McIntire, a white owner of a former Indian allotment on the Flathead Indian Reservation in Montana, to establish a right to the use of certain quantities of the waters of Mud Creek, a stream on the reservation, for the irrigation of her lands, and to enjoin interference with that right. The parties defendant are the United States, Harold L. Ickes, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, Alex Pablo and A. M. Sterling (who are appellees in this Court), the Flathead Irrigation District, a corporation, and various individuals who are described as members of the Flathead Tribe of Indians.

The second amended complaint, filed May 16, 1936, on which the action was tried, alleges: The Flathead Indian Reservation was set aside for the Flathead Nation by a treaty ratified in 1859 (12 Stat. 975) (R. 74). The Flathead Indians were encouraged to become a self-supporting agricultural people with permanent homes on lands thereafter to be allotted to them in severalty (R. 74–75). The

lands of the reservation can be cultivated only by irrigation, for which one inch of water per acre is necessary (R. 75). Following the treaty, the Indians settled upon the reservation and began to farm by means of irrigation with the waters flowing upon the reservation (R. 75). Michel Pablo and Lizette Barnaby, Flathead Indians, each "made allotment for" described lands (R. 75). In April 1900, Michel Pablo, who was then in possession of both tracts, constructed an irrigation ditch carrying 160 inches of water per second from Mud Creek, of which the allottees thus became the appropriators (R. 75–76). That appropriation has become appurtenant to the described lands and has not been abandoned (R. 76). In 1918 fee patents were issued to Agatha Pablo, wife of Michel Pablo, for the lands allotted to him and to Lizette Barnaby, and thereafter those lands were sold to the plaintiff who now owns them together with 160 inches per second of water appurtenant thereto (R. 76). The Act of April 23, 1904, providing for the allotment of the lands on the Flathead Reservation and the opening of the lands for sale and disposal, as amended by the Act of June 21, 1906 (34 Stat. 355), provides (Section 19):

> That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water. (R. 77.)

From April 1900, continuously up to the present time the ditch has been used in conveying the waters from Mud Creek to the described lands, and the plaintiff claims the benefit of the Act of June 21, 1906, in the use of 160 inches per second of waters carried in the ditch (R. 77). The United States "claims an interest in the waters" of Mud Creek, and has dammed up the Creek and has deprived plaintiff of waters to which she is entitled (R. 78). The plaintiff's right to the use of the waters became fixed prior to the claim of the United States, and the United States, under the Act of June 21, 1906, has no right to deprive plaintiff of them (R. 78). No other parties use the waters of Mud Creek except the plaintiff and the United States acting through the Flathead Irrigation Project, and "this plaintiff and the United States are tenants in common or joint tenants in the use of said water" (R. 78). The waters of Mud Creek "can be divided, partitioned and separated" so that the amount of water to which the plaintiff is entitled can be determined, and the United States is made a party under Title 28, U. S. Code, § 41 (25) "for the purpose of completely adjudicating the waters of Mud Creek as between this plaintiff and said defendant" (R. 78).[1] Harold L.

[1] Title 28, U. S. Code, § 41 (25) (Judicial Code, Section 24, paragraph 25, 30 Stat. 416, 36 Stat. 1094) confers upon the federal district courts jurisdiction of "suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants n common or joint tenants * * *."

Ickes, Secretary of the Interior, is claiming to be in charge, under acts of Congress, of the Flathead Irrigation Project, and Henry Gerharz is claiming to be the Project Engineer in direct charge of the project (R. 78–79). These defendants are claiming that the plaintiff has no water rights on Mud Creek independant of the Flathead Irrigation Project, and are claiming the right to deprive plaintiff of the use of the water except upon the payment to the project of fees and charges (R. 79). The value of the water in controversy exceeds $3,000; this action is necessary to prevent a multiplicity of suits; and the plaintiff has no adequate remedy at law (R. 79). Alex Pablo and A. M. Sterling each claim that the appropriation of Michel Pablo was also made for lands now owned by them (R. 79–80). The Flathead Irrigation District and the individual defendants at one time claimed some rights in the waters of Mud Creek (R. 80).

The plaintiff prayed that the waters of Mud Creek be adjudicated between the United States and the plaintiff; that plaintiff's rights be "partitioned, separated, fixed, and established"; that plaintiff be given a right to the use of 160 inches of water with a priority of April, 1900; and that the defendants be restrained from interfering with the rights of plaintiff as found (R. 81).

After the filing of the original complaint (which was substantially like the amended complaint above summarized), the District Judge ordered the Secretary of the Interior "to appear, plead, answer or

demur" under Judicial Code, Section 57. That Section (36 Stat. 1102, 28 U. S. C., § 118) authorizes a district court to direct a non-resident defendant to "appear, plead, answer, or demur" in a suit to enforce any claim to real or personal property in the district where the suit is brought. The Secretary of the Interior appeared specially and moved that the complaint be dismissed as against him, on the grounds that the court had no jurisdiction over him because the suit was brought in a district other than that of his residence, and that the suit was against the United States which could not be sued without its consent and which had not consented to be sued (R. 20–21). The motion was denied (R. 23), and the Secretary did not appear further in the case (R. 166).

The United States and Henry Gerharz, the Project Engineer of the Flathead Irrigation Project, also appeared specially and moved that the complaint be dismissed as against them, the United States on the ground that it could not be sued without its consent and it had not consented to be sued (R. 19–20), and Gerharz on the grounds that the complaint did not state a cause of action against him and that the suit was against the United States which could not be sued without its consent and which had not consented to be sued (R. 21–22). These motions were denied (R. 23). Motions by the United States and by Gerharz to dismiss the second amended complaint (above summarized) were also denied (R. 82–85).

The answer of the United States to the second amended complaint sets up four affirmative defenses: 1. The United States has not consented to be sued. 2. The action was not brought for the partition of lands. 3. This action was brought to settle the relative priorities and rights of the parties to the use of the waters of Mud Creek. 4. The facts alleged do not state a cause of action against the United States (R 87–88).

The answer of Henry Gerharz, the Project Engineer, alleges that by the establishment of the Flathead Reservation the United States reserved all the waters of streams of the reservation, including Mud Creek, for irrigation and other uses upon the reservation, and exempted those waters from appropriation (R. 90); denies any knowledge of the alleged appropriation of waters of Mud Creek by Michel Pablo (R. 91); admits that the United States claims an interest in the waters of Mud Creek and has dammed up the creek (R. 91); alleges that all acts done by him relevant to this suit were done in pursuance of the orders, rules and regulations of the Secretary of the Interior (R. 92); alleges that the west eighty acres of the plaintiff's lands were by court order included in the Flathead Irrigation District, that thereafter the district entered into repayment contracts with the United States and those lands of the plaintiff became subject to those contracts, and that he, as Project Engineer, assessed against the lands of the plaintiff certain charges in

connection with the project (R. 93); and alleges that whatever rights the individual defendants have in the waters of Mud Creek are subservient to the rights of and were granted by the United States (R. 95).

In addition, the answer of Gerharz sets forth six affirmative defenses: 1. This action is not for the partition of lands, but to quiet title to the use of waters (R. 95). 2. The facts alleged do not state a cause of action (R. 95). 3. The Court has no jurisdiction of the subject of the action (R. 96). 4. The United States has constructed the Flathead Irrigation Project to irrigate the irrigable lands on the Flathead Reservation and now owns and operates that project (R. 97–98). All the waters of the streams of the reservation, including Mud Creek, are used by the project and are necessary for the irrigation of lands under it (R. 99). Part of the plaintiff's lands are entitled to water from the project upon payment of lawful charges (R. 99), and that is the only water right the plaintiff has (R. 98–99). No waters of the reservation were or could be appropriated by plaintiff's predecessors or any other person (R. 99). When the irrigation project was undertaken the United States recognized water right developments on the reservation antedating 1909, and the Secretary of the Interior appointed a committee which investigated such rights and made a report thereon (R. 99–100). The Secretary approved the report, granted to the west eighty of the plaintiff's lands a right to 1,000 gallons per day of the waters of Mud Creek for

domestic and stock use, and declared that no other water right was appurtenant to those lands (R. 100–101). 5. Pursuant to federal and Montana law, the United States appropriated the waters of Mud Creek in the years 1909 and 1912. Before that, and since, the United States, through the Flathead Irrigation Project, has continuously used all the waters of Mud Creek (R. 101–102). 6. For more than ten years prior to the filing of this action the United States had exercised open and notorious ownership and control of all of the waters of Mud Creek under claim of title. Accordingly the United States has title to those waters by adverse possession, the plaintiff is barred by the Montana statutes from asserting any right in them, and has been guilty of laches (R. 103–104).

The answer of the individual Indian defendants sets forth substantially the same defenses as that of Gerharz (R. 106–107).

The answer of the Flathead Irrigation District follows the same general theory as does that of Gerharz. It alleges that no rights in the waters of Mud Creek could be acquired by appropriation (R. 126), avers that the Flathead Irrigation Project was initiated before the allotment of reservation lands (R. 125), and that by the initiation of the project all the waters of the reservation were segregated and appropriated for the project (R. 125).

The answer of the defendants A. M. Sterling and Alex Pablo admits that Michel Pablo appropriated 80 inches per second of the waters of Mud Creek for the irrigation of his allotment (now the west eighty

of the plaintiff's lands), and that that appropriation has not been abandoned, but denies that any water was appropriated for or used upon the Lizette Barnaby allotment (plaintiff's east eighty) (R. 139–140). By way of cross complaint it alleges that Alex Pablo is the son of Michel Pablo and the owner by allotment of certain described lands (R. 143–144); that A. M. Sterling is the owner of certain other described lands which were formerly the allotment of Agatha Pablo, the wife of Michel Pablo (R. 144); that in April, 1900, Michel Pablo appropriated 560 inches of the waters of Mud Creek for the irrigation of his allotment and those of his wife and children (R. 143), including 80 inches of water for the lands of Alex Pablo and 80 inches for the lands now owned by Sterling (R. 145); that this appropriation has not been abandoned (R. 143); and that the defendants Alex Pablo and Sterling and the plaintiff are each entitled to 80 inches of the waters of Mud Creek, with priority over the rights of any other person but without priority among themselves (R. 146–147).

By agreement of counsel all new matters in the answers were deemed denied without need of a reply (R. 335).

The jurisdiction of the District Court in this suit rests upon Judicial Code, Section 24, paragraph 1 (36 Stat. 1091, 28 U. S. C., § 41 (1)) which confers upon the federal district courts jurisdiction of civil suits which arise "under the Constitution or laws of the United States, or treaties made * * * under their authority * * *."

The consent of the United States to be sued in this suit rests upon Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)) which confers upon the federal district courts jurisdiction—

> of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants * * *.

STATEMENT OF THE CASE

Appellees each assert rights to the use of sufficient quantities of the waters of Mud Creek to irrigate in their entirety their respective lands (R. 81, 148–149). The duty of water on these lands is said to be one inch per second per acre (R. 75, 142), and the plaintiff's tract of land contains 160 acres and those of Pablo and Sterling 80 acres each (R. 75–76, 143–144). Appellees' claims are based upon an alleged prior appropriation of waters of Mud Creek by Michel Pablo for the irrigation of the lands now owned by them, upon confirmation and recognition of the right of appropriation so acquired by Section 19 of the Act of April 23, 1904, as amended by the Act of June 21, 1906, and upon nonabandonment of that right (R. 74–81, 138–149).

As to the merits of those claims, these appellants contended (1) that no right in any waters of the Flathead Reservation could be acquired by an individual by appropriation; (2) that if a right in waters of the reservation could be so acquired, no such quantities of water as are claimed by the plaintiff,

Pablo and Sterling were ever appropriated for their lands; (3) that if such quantities of water ever were used on those lands their use was thereafter in whole or in part abandoned, and that for more than the prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed those waters adversely to the plaintiff and to Pablo and Sterling.

These appellants contended, however, that the determination of these questions upon their merits is precluded because the United States, an indispensable party, has not consented to be sued.

As detailed in the statement of pleadings, *supra*, the District Court overruled the contention that the United States had not consented to be sued, and a trial on the merits was had. Evidence was introduced as to the original appropriation of waters by Michel Pablo—its extent and the lands on which the waters were used—and as to the extent and continuity of the irrigation of the lands of the appellees since that time (R. 239–342). At the conclusion of the trial the District Court held for the appellees upon all the issues and gave a decree awarding each of them the quantities of water they claimed (R. 225).

QUESTIONS PRESENTED

1. Whether the United States consented to be sued in this action by Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)), which provides for—

> suits in equity brought by any tenant in common or joint tenant for the partition of lands

> in cases where the United States is one of such tenants in common or joint tenants * * *

2. Whether the United States is an indispensable party to this action.

3. Whether a right to the use of waters of a stream on the Flathead Reservation needed for the irrigation of Indian lands could be acquired by appropriation.

4. Whether, if the preceding question be answered in the affirmative, a right to the use of waters of Mud Creek was acquired by appellees' predecessors, to the extent of 320 inches of water, for use on lands now owned by appellees.

5. Whether, if the two preceding questions be answered in the affirmative, the right to the use of those quantities of waters has been abandoned in whole or in part and has been acquired by the United States through adverse possession.

SPECIFICATION OF ERRORS

The assigned errors which are to be relied upon are: Assignment of Errors of the United States, Numbers 1 through 9, inclusive (R. 344–346); Assignment of Errors of the Secretary of the Interior, Numbers 1 and 2 (R. 347); Assignment of Errors of Henry Gerharz, Project Engineer, Numbers 1 through 7, inclusive (R. 348–349), and Assignment of Errors of the individual defendants, members of the Flathead Tribe, Numbers 1 through 5, inclusive (R. 350–351).

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SUMMARY OF ARGUMENT

I. The United States cannot be sued except when Congress has expressly consented. Judicial Code, Section 24, paragraph 25 (36 Stat. 1094, 28 U. S. C., § 41 (25)), upon which appellees rely, provides that the United States may be sued in suits "for the partition of lands" of which the United States is one of the "tenants in common or joint tenants." This suit is not within that statute for these reasons:

1. The United States and appellees are not tenants in common or joint tenants of any right in the waters of Mud Creek, and this suit is not for the partition of any such right, but simply to adjudicate the extent and validity of the appellees' water rights. In order for persons to be tenants in common or joint tenants of a water right which is appurtenant to certain land they must be tenants in common or joint tenants of the land to which the water right is appurtenant. The appellees and the United States are not cotenants of the lands—the appellees are the sole owners. The relief actually given by the District Court in no particular resembles partition; its decree merely adjudges that the appellees have certain water rights, and enjoins interference with those rights.

2. The statutory consent to a suit for the partition of "lands" does not include a suit for the partition of rights in waters. While a water right partakes of the nature of real estate, and may be appurtenant to land, it is in no sense land.

II. The United States is an indispensable party to this suit. While the United States is not an

indispensable party to a suit to enjoin an official from illegally interfering with rights of property, the United States is an indispensable party to a suit to litigate title to property held or claimed by an official for the United States. And this suit is clearly of the latter type.

III. The claims of the appellees to rights to the use of certain quantities of the waters of Mud Creek fail in their entirety, because their claims are based solely upon an alleged appropriation of those quantities of water for their lands by a predecessor in possession, and it has never been possible to acquire rights in waters of the streams of the Flathead Reservation by appropriation. This argument is not developed in this brief; with respect to it these appellants adopt and rely upon the brief which has been filed for the Flathead Irrigation District.

IV. If rights in the waters of streams of the Flathead Reservation could be acquired by appropriation, the record does not support the award to the appellees of as much water as was decreed to them by the District Court. No such amount of water was ever appropriated for the lands now owned by the appellees, by their predecessor in possession upon whose appropriation they base their claims. If such an amount of water was so appropriated, its use was thereafter in whole or in part abandoned, and for more than the statutory prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed that water, or part of it, adversely to the appellees, and has thereby acquired the right to its use.

ARGUMENT

I

The United States has not consented to be sued in this action.

Assignment of Errors No. 1 of the United States:

> The Court erred in overruling the motions of the defendant, the United States of America, to dismiss the original and the amended Bills of Complaint (R. 344).

Assignment of Errors No. 2 of the United States:

> The Court erred in overruling the motion of the defendant, the United States of America, for judgment upon the pleadings (R. 344).

Assignment of Errors No. 3 of the United States:

> The Court erred in holding that the defendant, the United States of America, has consented to be sued in this action (R. 345).

Assignment of Errors No. 4 of the United States:

> The Court erred in entering judgment against the defendant, the United States of America (R. 345).

Assignment of Errors No. 1 of Harold L. Ickes, Secretary of the Interior:

> The Court erred in overruling the motion of the defendant, the Secretary of the Interior, to dismiss the original Bill of Complaint (R. 347).

Assignment of Errors No. 2 of Harold L. Ickes, Secretary of the Interior:

> The Court erred in entering judgment against the defendant, the Secretary of the Interior (R. 347).

Assignment of Errors No. 1 of Henry Gerharz, Project Engineer:

> The Court erred in overruling the motions of the defendant, Henry Gerharz, to dismiss the original and the amended Bills of Complaint (R. 348).

Assignment of Errors No. 2 of Henry Gerharz, Project Engineer:

> The Court erred in entering judgment against the defendant, Henry Gerharz (R. 348).

Assignment of Errors No. 1 of the individual defendants:

> The Court erred in entering judgment against the defendants, members of the Flathead Tribe of Indians (R. 350).

"* * * no rule is better settled than that the United States cannot be sued except when Congress has so provided * * *." *Ickes* v. *Fox*, 300 U. S. 82, 96.

The District Court found that the appellees and the United States "are tenants in common, or joint tenants in the use of" the waters of Mud Creek, and that those waters "can be divided, partitioned, and separated" so that the rights of the appellees can be determined (R. 211–212, 218), and held that Congress had therefore consented to this suit by Judicial Code, Section 24, paragraph 25, *supra* p. 11.

This statute was originally enacted as Section 1 of the Act of May 17, 1898 (30 Stat. 416). Its legislative history shows that its purpose was to provide a

means whereby persons who were co-owners with the United States of real property could receive their respective interests in severalty. (See 31 Cong. Rec. 3864–3865; House Report No. 959, 55th Cong., 2d Sess.) Moreover, Section 2 of the Act (28 U. S. Code, § 766), which provides that "in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons" makes it clear that no extension of common law principles was intended, but that the purpose of the statute was entirely remedial.

It is the contention of the appellants that this suit is not within this statutory consent to sue the United States because the United States and the plaintiff are not tenants in common or joint tenants of any right in the waters of Mud Creek, and that this suit is not for the partition of any such right, but simply to adjudicate the validity, extent and priority of the plaintiff's water rights. As will be fully shown the appellees' contentions of a tenancy in common or joint tenancy and the findings of the Court below to that effect are wholly inconsistent with appellees' contentions of prior rights and with the relief actually given by the Court. The allegations were inserted merely to give color to the claim that the United States has consented to this suit. Appellants further contend that the statutory consent to a suit for the partition of "lands" does not include a suit for the partition of rights in waters.

A. Appellants and appellees are not tenants in common or joint tenants and this not a partition suit, but a suit to adjudicate rights in waters.

The characteristics and incidents of tenancies in common and joint tenancies have long been settled. The fundamental and common feature of both, and of all forms of cotenancy, is unity of possession. Each cotenant is entitled, as against his cotenants, to exclusive possession of any part of the property. In *Russell* v. *Beasley*, 72 Ala. 190, dismissing an action for partition, the court said (p. 190):

> It avails nothing to prove title to a *distinct portion* of the land proposed to be partitioned, for the essence of the estate in common, necessary to be here shown, is that the tenants should "own undivided parts, and occupy promiscuously, because neither knows his own severalty."

In *McConnel* v. *Kibbe*, 43 Ill. 12, 18, the parties owned separate parts of a tract of land covered by one building. Dismissing a suit for partition, the court said:

> The idea of the plaintiff in error that he and the defendant in error hold this property jointly, is not supported by the title deeds. They are neither joint-tenants, tenants in common nor coparceners, but they severally, each for himself, own distinct parts and portions of the premises, the character of which a court of chancery has no power to change.

See also *Hopkins* v. *Noyes*, 4 Mont. 550, 560, 2 Pac. 280, 283; 2 Blackstone, *Commentaries*, pp. 191–192; 2 Minor, *Real Property* (2d Ed.), pp. 1081–1082; 2 Thompson, *Real Property* (1924), pp. 963–964.

While the original application of this principle was to interests in land, it has never been questioned that it is equally applicable to rights in water. There must, accordingly, be unity of possession before there can be a tenancy in common or joint tenancy in a right to the use of water.

It is submitted that the Supreme Court of Montana has reached the correct result in *Cocanougher* v. *Montana Life Ins. Co.*, 103 Mont. 536, 64 P. (2d) 845, in which it held that, since rights to the use of water for irrigation are appurtenant to the lands irrigated, a tenancy in common of such rights cannot exist unless the lands irrigated are held in common, and that tenancy in common of an irrigation ditch is not sufficient to create tenancy in common of water rights. The complaint in that case alleged that the husband of the plaintiff had constructed an irrigation ditch and appropriated water thereby for the irrigation of certain land; that subsequently he conveyed part of the land to the defendants and part to the plaintiff; that the plaintiff and the defendants were tenants in common of the ditch and of the right to use the waters, and that the defendants had deprived the plaintiff of her rights in the waters. A demurrer to the complaint was overruled and the defendant appealed. The state Supreme Court held that the complaint did not state a cause of action. And it said (pp. 539–540):

> In view of the fact that plaintiff had already alleged separate ownership of certain lands in herself and other lands in the defendants,

> clearly there was not such a unity of possession between the parties as to render the ownership of the right to use the water as that of tenants in common.

Similarly, in *Norman* v. *Corbley*, 32 Mont. 195, 79 Pac. 1059, 1060–1061, the Supreme Court of Montana said:

> To constitute a tenancy in common there must be a right to the unity of possession * * * and if this right is destroyed the tenancy no longer exists. With respect to a water right this unity must extend to the right of user, for the parties can have no title to the water itself.

In accord that a tenancy in common of a water right can exist only if the land to which the water right is appurtenant is held in common, see also *Telluride* v. *Davis*, 33 Colo. 355, 357, 358, 80 Pac. 1051; *Snow* v. *Abalos*, 18 N. M. 681, 696, 140 Pac. 1044.[2]

Equally well settled is the nature of a suit for partition. Such a suit is available only between cotenants. *Shepard* v. *Mount Vernon Lumber Co.*, 192 Ala. 322, 325, 68 So. 880; Freeman, *Cotenancy and Partition* (1874), p. 521. Its purpose is to sever and divide the interests of cotenants.

[2] While it is theoretically possible for a joint tenancy to exist in a water right, no case dealing with such a tenancy has been found. This is perhaps attributable to the tendency to construe cotenancies as tenancies in common rather than as joint tenancies.

> The object of partition proceedings is to enable those who own property as joint tenants, or co-parceners, or tenants in common to so put an end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. *Brown* v. *Cooper*, 98 Iowa 444, 454.

Partition of a right in waters held in common is effected "either by apportioning the time and extent of use, or by a sale of the right and a division of the proceeds." *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 21. See also *Smith* v. *Smith*, 10 Paige Ch. (N. Y. 470, 474 ff.[3]

According to the strict common law, the plaintiff in a suit for partition must have a clear legal title. No question of title can be tried in an action for partition, and if any such question arises the suit must be stayed pending its resolution in an action at law. *Clark* v. *Roller*, 199 U. S. 541, 545; *Rich* v. *Bray*, 37 Fed. 273, 277 (C. C. Mo.). This rule has nearly everywhere been relaxed, and questions of title arising incidentally in a suit for partition are now usually tried in the partition proceeding. But even where this more liberal practice prevails the determination of title is incidental to partition as the main purpose of the suit. *Torrence* v. *Shedd*, 144 U. S. 527, 532; *Middelcoff* v. *Cronise*, 155 Calif. 185, 191, 100 Pac. 232.

[3] Some courts have asserted that, because of the administrative difficulty of apportioning the use of water, a water right can be partitioned only by sale of the right and division of the proceeds. *Brown* v. *Cooper*, 98 Iowa 444, 454–455; *McGillivray* v. *Evans*, 27 Calif. 92, 96–98.

It is apparent from the pleadings and the relief sought that the appellants and the appellees are not tenants in common or joint tenants, and that this is not a partition suit but a suit primarily for the adjudication of water rights. The appellees claimed (R. 75–76, 143–146), and the District Court found (R. 210–211, 216–217) that Michel Pablo appropriated waters of Mud Creek for the irrigation of certain described lands by means of a ditch which he constructed, that the water appropriated by him became appurtenant to the lands, and that appellees now own those lands together with the water rights appurtenant thereto. The conclusions of law of the District Court recite that the ditch built by Michel Pablo became appurtenant to lands now owned by the appellees, and that they now own the ditch (R. 219–220). The appellees claim that they are joint tenants or tenants in common with the United States of the right to use the waters of Mud Creek, and that those waters can be "divided, partitioned, and separated" so that their rights can be determined (R. 78, 148). But they also contend that their "right to the use of said waters became vested long prior to the claim of the United States" (R. 78, 147), a claim wholly inconsistent with the unity of possession essential to a tenancy in common or joint tenancy. Similarly, the relief that they seek is not only that their rights be "partitioned, separated, fixed, and established," but also that they "be given a prior right to the use of said waters" (R. 81, 148). The decree of the District Court adjudges that the appellees are entitled to water sufficient for the irriga-

tion of their lands, without interference on the part of the appellants, and that the use of this water is their private property and appurtenant to their lands (R. 225–226), thus decreeing a prior right inconsistent with tenancy in common of the appellees and the United States of the right to use the waters of Mud Creek. The decree makes no mention of partition, awards no water to the United States, and contains no reference to its rights.

The position taken by the appellees that they and the United States are tenants in common, or joint tenants, in the use of the waters of Mud Creek, and the findings of the District Court to that effect, are thus wholly inconsistent with other allegations in the pleadings and with the findings of fact, conclusions of law and decree of the District Court. The water rights claimed by the appellees are alleged by them and found by the District Court to be appurtenant to lands of which they are the sole owners. The language of the Supreme Court of Montana in *Cocanougher* v. *Montana Life Ins. Co.*, 103 Mont. 536, 539–540, 64 P. (2d) 845, discussed *supra* p. 20, with respect to a similar situation is pertinent. It said:

> It is argued that the allegation that the parties owned the water right as tenants in common is a mere conclusion of law and therefore ineffectual. In view of the fact that plaintiff had already alleged separate ownership of certain lands in herself and other lands in the defendants, clearly there was not such a unity of possession between the parties as

> to render the ownership of the right to use the water as that of tenants in common. (*Norman* v. *Corbley*, 32 Mont. 195, 79 Pac. 1059; *Snow* v. *Abalos*, 18 N. M. 681, 140 Pac. 1044; *City of Telluride* v. *Blair*, 33 Colo. 355, 80 Pac. 1051, 108 Am. St. Rep. 101). The conclusion of the pleader was not supported by the facts alleged.
>
> If the parties to this action had owned the land as tenants in common and the water right was appurtenant to the land, then it might be said that they owned the water right in common.

The United States and the appellees are not even cotenants of the Michel Pablo ditch, though that would not make them cotenants of the water rights.

Moreover the relief actually given does not in any particular resemble partition. The appellees are each decreed to be entitled to certain waters (R. 225). No water is allocated to the United States, the alleged cotenant. Instead its Project Engineer is enjoined from interfering with the rights decreed to the appellees (R. 225–226).

It is plain, we submit, that the United States has not consented to be sued in a suit such as this; that this is in no sense a suit for the partition of lands of which the United States is a cotenant; and that the attempt of the plaintiff to label it as such is but a subterfuge to avoid the sovereign immunity of the United States from suit.[4]

[4] Judge Pray, who presided at the trial of the case, stated in his opinion that he considered himself bound by the earlier ruling of Judge Bourquin upon this question, irrespective of his own views (R. 166–167).

B. The statute applies to lands and not to waters.

What has been thus far said has ignored the fact that the statutory consent is only to a suit for the partition of "lands", while this suit, even if it were a suit for partition, deals solely with waters. "A water right—a right to the use of water—while it partakes of the nature of real estate [citation], is not land in any sense, and, when considered alone and for the purpose of taxation is personal property." *Verwolf* v. *Low Line Irr. Co.*, 70 Mont. 570, 578, 227 Pac. 68. And it is well established that a "* * * suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued." *United States* v. *Michel*, 282 U. S. 656, 659. In view of that principle it is submitted that the statute under discussion does not consent to a suit against the United States for the partition of a water right separate and distinct from any partition of lands. As an appurtenance to lands held by the United States in cotenancy with others the waters might be partitioned, but that is not this case.

II

The United States is an indispensable party to this suit.

The District Court held that the United States had consented to be sued and hence did not rule upon the proposition whether the United States is an indispensable party to this suit. It is submitted that the United States is an indispensable party to the suit with respect to all of the appellants, and since the United States has not consented to be sued

the Court below erred in denying the motions to dismiss on that ground.

1. The United States is an indispensable party defendant in this suit under the decisions of this Court in *Moody* v. *Johnston*, 66 F. (2d) 999, and 70 F. (2d) 835. Those suits, like the present, were brought by white owners of former Indian allotments in the Flathead Reservation for the adjudication of water rights alleged to be appurtenant to the allotments. The Project Manager of the Flathead Reclamation Project, who alone had been made a defendant, moved to dismiss on the ground that the United States and the Secretary of the Interior were necessary parties. The District Court denied the motion. At the trial the plaintiffs introduced in evidence a report of the committee which the Secretary of the Interior had appointed to investigate water rights on the reservation antedating the Flathead Irrigation Project, which they claimed showed that water rights were appurtenant to their lands prior to the project. The District Court entered a decree which adjudged that "Plaintiffs are entitled * * * to sufficient water to irrigate their lands," not to exceed a certain quantity of water per acre, without interference by the defendant; and that the defendant be enjoined from levying against the plaintiffs any charges in connection with the reclamation project, from denying the water rights of the plaintiffs, and from in any way clouding the title of the plaintiffs to their water rights. This

Court reversed the decree and remanded the case to the District Court with directions to dismiss for want of necessary parties, unless the plaintiffs within a reasonable time amended their complaints to bring in the necessary parties. As to who were the necessary parties, the Court said (66 F. (2d) at 1003):

> If no greater amount of water is claimed for the allotments in question upon this appeal than as stated in the report of the committee made to the Secretary of the Interior respecting diversions and applications of water for irrigation purposes prior to the initiation of the Flathead Reclamation Project, and such amount of water is recognized as properly apportioned to said lands in the administration of said project, then the Secretary of the Interior would be the only additional necessary party to actions for the determination of questions whether such lands were liable to construction, maintenance, and operation charges imposed on account of the project. Where there has been no recognized determination of the amount or duty of water, even though some indefinite amount may have been diverted and applied to certain allotments or tracts of land prior to the construction of the project works, a determination of the amount of water to which the land may be entitled as well as liability for construction, maintenance, and operation charges may not be determined without not only the Secretary of the Interior being made a party defendant, but the United States or others who may be affected by any change in the use of water available for irrigation.

Thereafter the plaintiffs filed amended bills of complaint, and brought in the United States and the Secretary of the Interior as additional parties defendant, but did not bring in all of the individual water users who would be affected by the decree sought. Upon application of the Secretary and of the Project Engineer this Court thereupon granted a writ of mandamus directing the District Court to dismiss the proceeding on the ground that all the necessary parties had not been joined. In its opinion on the application for mandamus (70 F. (2d) 835, at 839), speaking of its former opinion, the Court said:

> With reference to the United States as a party, we held that, if it was sought by the plaintiffs to litigate a private right in and to the waters as distinguished from the rights asserted by the United States in and to the waters diverted by the United States for the reclamation project and delivered to the defendants, the United States was a necessary party and that the Secretary of the Interior was a necessary party, and that others who would be affected by the change in the use of waters available for irrigation would be necessary parties. . . . It will be observed that we thus called attention to two possible methods of amendment—one requiring only the presence of the Secretary of the Interior; the other requiring all others "affected by any change in the use of water available for irrigation" to be brought in, including the Secretary of the Interior and the United States.

The present case is clearly of the class which this Court thus held could be maintained only if not merely the Secretary but the United States and all other parties claiming an interest in the water were joined. The complaint in this case is devoted solely to the assertion of a water right claimed to exist independently of and anterior to the Flathead Irrigation Project. The plaintiff does not seek a water right under that project, or raise any question as to the charges incident to such a right. The complaint in this case thus closely resembles the amended complaint in *Moody* v. *Johnston*, and in fact was unquestionably modeled after it.[5]

2. The decision of this Court in *Moody* v. *Johnston* that the United States is an indispensable party to a suit like the present is in accord with the precedents. In that case, as has just been shown, this Court drew a distinction between a suit which, like the present, is concerned primarily with the adjudication of a right in waters claimed by the United States and a suit to

[5] The original complaint in this case was filed after the first decision in *Moody* v. *Johnston*, but before the decision on mandamus. The Secretary, the Project Engineer, and the United States were made parties defendant. After the opinion on mandamus in *Moody* v. *Johnston* the complaint in the present case was amended to bring in as additional defendants individuals claiming an interest in the waters. Like the amended complaint in *Moody* v. *Johnston*, the complaint in this case seeks to state a cause of action for partition, and so to bring the suit within Judicial Code, section 24, paragraph 25.

determine the legality of charges assessed by officials of the United States for furnishing to an individual water to which he has a vested right or his right to which is at least not the basic concern of the suit. The Court distinguished, in other words, between a suit to litigate title to property claimed by the United States and a suit to protect property from official action alleged to be illegal. And it held that a suit of the latter type was not a suit to which the United States was an indispensable party, but on the other hand, that a suit of the former type was a suit to which the United States was an indispensable party.

This distinction is precisely that which had been drawn by the Supreme Court in a long line of decisions. That Court has consistently held that a suit against an official of the United States to litigate title to property held by the official for the United States is a suit against the United States—or, what is the same thing, a suit to which the United States is an indispensable party—and so cannot be maintained. *Oregon* v. *Hitchcock*, 202 U. S. 60, 69–70; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *New Mexico* v. *Lane*, 243 U. S. 52, 58. See *Carr* v. *United States*,

98 U. S. 433, 437-438.[6] It is equally well established that a suit to enjoin illegal interference by officials with rights of property is not a suit against the United States. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Ickes* v. *Fox*, 300 U. S. 82.

While the distinction between a suit against an official to try title to property held by the official for the Government and a suit to enjoin an official from illegal interference with vested rights of property is sometimes shadowy and productive of considerable difficulty, compare *Ickes* v. *Fox*, 300 U. S. 82, with *Morrison* v. *Work*, 266 U. S. 481, it is clear that the present suit is of the former type. The basic purpose of this suit is avowedly to try the water right of the plaintiff against the United States. The appellees have alleged (R. 77–78, 147):

> That the United States of America, defendant herein, claims an interest in the waters flowing

[6] This Court and the Circuit Court of Appeals for the Fourth Circuit have further elaborated the doctrine: The United States would not be bound by any decree rendered against its official with respect to title to property held by him for the United States, and since a decree would thus be a nullity, such a suit will not be entertained. *Electric Steel Foundry* v. *Huntley*, 32 F. (2d) 892, 893 (C. C. A. 9); *Wood* v. *Phillips*, 50 F. (2d) 714, 717–718 (C. C. A. 4); *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, 456–457 (C. C. A. 4). See also *Sanders* v. *Saxton*, 182 N. Y. 477, 75 N. E. 529. An action of ejectment may be brought against officials holding property for the United States, but that is because such a suit does not litigate the title but only the possession of the defendant. See *Carr* v. *United States*, 98 U. S. 433, 437–438; *United States* v. *Lee*, 106 U. S. 196, 216–217; *Wood* v. *Phillips*, 50 F. (2d) 714, 717 (C. C. A. 4).

> in said Mud Creek and has dammed up said creek and carries part of the waters away from plaintiff, and has deprived plaintiff of the full use of the waters to which she is entitled. That plaintiff's right to the use of said waters became vested long prior to the claim of the United States * * *.

Again, (R. 78, 148):

> That there are no other parties using the waters of Mud Creek except this plaintiff and the United States, acting through the Flathead Reclamation Project, and in the use of said water from said Mud Creek this plaintiff and the United States are tenants in common or joint tenants in the use of said water. That the waters of said Mud Creek can be divided, partitioned and separated so that the amount of water this plaintiff is entitled to use can be fixed and determined and the United States is made a party herein under the provisions of Title 28, Section 41, Subdivision 25 of the U. S. C. A. (30 Stat. L. p. 416) for the purpose of completing adjudicating the waters of Mud Creek as between this plaintiff and said defendant.

The prayers for relief ask (R. 81, 148):

> * * * that if any interest is claimed by the United States to said waters, the waters therein may be adjudicated between the United States and this plaintiff * * *.

There is, accordingly, no question but that this is a suit to litigate title to property claimed by the United States, and that the United States is consequently an indispensable party to the suit.

Furthermore, the District Court held that it had jurisdiction over the Secretary of the Interior, a non-resident of the district where this suit was brought, under Judicial Code, Section 57 (36 Stat. 1102, 28 U. S. C., § 118), which provides that in a suit to enforce a claim to property brought in the district where the property is located the court may order a non-resident defendant to appear. This holding shows conclusively that this suit is to litigate title to property, and since that property, as the appellees themselves assert, is claimed by the United States, that the United States is an indispensable party. And in the only decision which has been found dealing with a suit brought under Section 57 against an official acting for the United States, *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451, the Circuit Court of Appeals for the Fourth Circuit squarely held that the United States was an indispensable party to the suit, and that the suit could not be maintained against the officials. In that case the Federal Power Commission had ordered the plaintiff not to build a proposed power dam until it accepted a license tendered by the Commission. The plaintiff brought suit, under Judicial Code, Section 57, in the district in which the dam was to be built, against the members of the Commission, non-residents of that district, alleging that certain provisions of the Federal Water Power Act were unconstitutional. The prayer requested that the Commission's orders be declared void and that the defendants be enjoined from enforcing the Act. The District Court dismissed the

bill on the merits. The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with directions to dismiss for want of jurisdiction. It said (67 F. (2d) at 456):

> And this brings us to another and conclusive reason why the suit cannot be sustained on any ground as a suit to remove cloud from title, viz., that no one claiming under the alleged cloud has been made a party to the suit and any relief granted would be entirely nugatory. The defendants are asserting no rights under the orders in question and have no personal interest in them. The interest is in the public represented by the government of the United States. The United States has not been made a party and has not consented to be sued in such a case; and yet it is well settled that in a suit to remove a cloud or quiet title the adverse claimant is a necessary party to the suit. *Wood* v. *Phillips* (C. C. A. 4th) 50 F. (2d) 714, 717; 5 R. C. L. 669, and cases cited. To grant relief against the defendants here would amount to nothing. It would not be binding upon the United States or even upon the Power Commission.

Certiorari was denied, 291 U. S. 674. Compare *Wood* v. *Phillips*, 50 F. (2d) 714 (C. C. A. 4); *Sanders* v. *Saxton*, 182 N. Y. 477, 75 N. E. 529.

III

It has never been possible to acquire rights in waters of the streams of the Flathead Reservation by appropriation.

With reference to the errors assigned upon the holding of the Court below that the appellees are entitled to the usufruct of certain quantities of the waters of Mud Creek solely upon an alleged appropriation of those quantities of waters by Michel Pablo, and upon their succession to the rights to be acquired,[7] it is appellants' contention that it has never been possible to acquire rights in the waters of the streams of the Flathead Reservation under the doctrine of prior appropriation, and that the claims of appellees must therefore fail in their entirety. This contention is also advanced by the other appellant, the Flathead Irrigation District and is fully presented in its brief filed in this Court (pp. 15–34). In order to save the time of this Court, and to avoid needless duplication, these appellants do not reargue that question, but hereby adopt, and rely upon as their own, the argument upon that question in the brief of the Flathead Irrigation District.

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[7] Nos. 2, 4, 6, 7, and 9 of the United States (R. 344–346); No. 2 of the Secretary of the Interior (R. 347); Nos. 1, 2, 3, 4, 6, and 7 of the defendant Gerharz (R. 347–349); and Nos. 1, 2, 3, and 5 of the individual defendants (R. 350–351).

IV

Even if rights in waters of streams of the Flathead Reservation could have been acquired by appropriation, the record does not support the award to the appellees of as much water as was decreed to them by the District Court.

The decree of the District Court awards to the appellees waters sufficient to irrigate their respective tracts of land, not to exceed one inch per acre (R. 225). The tract of the plaintiff contains 160 acres and those of Sterling and Pablo contain 80 acres each. Similarly, the conclusions of law of the District Court recite that the plaintiff is entitled to 160 inches of water per second and Pablo and Sterling to 80 inches each (R. 213, 220).

It is the contention of these appellants that, even if this Court holds that rights in streams of the Flathead Reservation, including waters of Mud Creek could be acquired by appropriation, the record does not support the award to the appellees of as much water as was awarded to them by the District Court. No such amount of water was ever appropriated by Michel Pablo for the lands now owned by the appellees and even if such an amount of water had been so appropriated its use was thereafter in whole or in part abandoned. For more than the prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and claimed that water, or part of it adversely to the appellees, and the United States has thereby acquired the right to its use.

As shown *infra*, and as brought out in greater detail in the Brief for the Flathead Irrigation District (pp. 39–43), all the waters of the Flathead Reservation were, before the death of Michel Pablo in 1914, reserved for the Flathead Irrigation Project. The appellees, recognizing that any water rights they assert must antedate that reservation, do not claim any greater quantities of water than Michel Pablo appropriated; they allege merely that the water rights which he acquired for the lands they now own have not been abandoned (R. 76, 143).

A. Michel Pablo did not appropriate for the lands now owned by the appellees as much water as was awarded to them by the District Court.

Assignment of Errors No. 6 of the United States:

> The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 345).

Assignment of Errors No. 3 of Henry Gerharz, Project Engineer:

> The Court erred in holding that the plaintiff, Agnes McIntire, and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 348).

Assignment of Errors No. 2 of the individual defendants:

> The Court erred in holding that the plaintiff, Agnes McIntire and the defendants, A. M. Sterling and Alex Pablo, are entitled to appropriate the waters of Mud Creek, not to exceed one inch per acre, to irrigate described lands belonging to said plaintiff and defendants (R. 351).

Two witnesses testified for the plaintiff as to the amount of water used, that is, the acreage irrigated, by Michel Pablo: John Ashley, a 77-year-old Indian, and Jean McIntire, the plaintiff's son.

Ashley testified that Michel Pablo irrigated "pretty near all" of three 80 acre tracts—the west eighty of the land now owned by the plaintiff and the eighties now owned by Alex Pablo and A. M. Sterling; that Michel Pablo did not irrigate the east eighty of the land now owned by the plaintiff except for a garden (R. 241).

Jean McIntire, the plaintiff's son, testified that he saw the land now owned by plaintiff in 1907 when he was fourteen years of age; that at that time there were good crops on the land; that crops could not be grown on "the majority of" the land without irrigation; that he did not know the number of acres irrigated in 1907 or the amount of water used (R. 243–244).

Two witnesses likewise testified for Pablo and Sterling as to the acreage irrigated by Michel Pablo: Alex Pablo himself, the son of Michel Pablo, and Andrew Stinger, the partner of Michel Pablo in the cattle business from 1907 or 1908 until the latter's death in 1914.

Alex Pablo testified that Michel Pablo, up until his death, irrigated about 20 acres of his (Alex Pablo's) allotment and about 25 acres of the land now owned by Sterling when he raised hay; that when Michel Pablo grew crops other than hay he did not irrigate (R. 316); that the east forty of his (Alex Pablo's) allotment needs water to raise a good crop (R. 317).

Stinger testified that he was thoroughly familiar with the Pablo ditch; that it was used for the watering of Michel Pablo's stock; that he never saw him irrigate out of the ditch (R. 326).

In addition to these two witnesses, Pablo and Sterling introduced in evidence a certified copy of a notice of water right filed in the office of the clerk and recorder of Missoula County, Montana, in November, 1907. This notice, signed by Michel Pablo and his wife and children, asserted that they had a right to the use of 560 inches of water for domestic and irrigating purposes on described lands, which total 560 acres (R. 319-321). All of the lands for which water rights are sought in the present suit are included in the description except the plaintiff's east eighty.

It is plain that this evidence, even if taken at its face value, does not entitle the plaintiff or the defendants Pablo and Sterling to the amounts of water awarded to them by the District Court.

There is no evidence that the plaintiff's east eighty was irrigated at all, aside from Ashley's testimony that a garden plot was irrigated on it. No water

right for that tract was asserted even in the expansive notice of water right. Accepting Ashley's testimony that "pretty near all" of the plaintiff's west eighty was irrigated, the plaintiff is at most entitled to 80 or 90 inches of water—far short of the 160 inches awarded her by the District Court.

Alex Pablo himself claimed only that his father had—when he grew hay—irrigated about 20 acres of his (Alex Pablo's) allotment (R. 316). While his testimony in this respect differs from that of Ashley, it is evident that Alex Pablo was the better informed of the two, and as an interested party certainly he had no reason to understate the extent of his father's irrigation. Alex Pablo should have no more than the 20 inches of water to which his own testimony entitles him, and not the 80 inches awarded to him by the District Court.

Much the same may be said as to the Sterling eighty. Ashley said that "pretty near all" of it was irrigated by Michel Pablo; Alex Pablo said about 25 acres. The District Court awarded water sufficient to irrigate every inch of it.

Thus, even accepting literally the testimony offered by the appellees, it is plain that the water rights awarded to them by the District Court must be radically scaled down. And that is even plainer when the evidence introduced by the appellants is considered.

When the Flathead Irrigation Project was initiated in 1909, and the waters of the reservation were reserved for the project (as shown *infra*), the Secre-

tary of the Interior determined to recognize all existing water right developments on the Flathead Reservation. Accordingly the Secretary designated a committee to report upon the extent of such developments. This committee, composed of the Superintendent of the Flathead Agency, an assistant engineer of the Reclamation Service, and Alphonse Clairmont, a Flathead Indian selected by the tribal council (R. 272), investigated the status of water right developments on all the lands for which water rights are sought in the present case. Both Michel Pablo and his wife, Agatha Pablo, testified before the committee. A certified copy of their testimony was admitted in evidence (R. 306).

Michel Pablo testified that he irrigated "very little" of the land on his allotment (plaintiff's west eighty); that he used his ditch "for my stock to drink out of and used it on some trees and switched into some gravelly places but not much" (R. 308). He further testified that a map which was shown to him fairly represented the location of the ditches and the irrigated area on his allotment, the allotment of Alex Pablo and on that of Agatha Pablo (now owned by Sterling) (R. 308). A copy of this map is before this Court as Defendants' Exhibit No. 5. Michel Pablo estimated the irrigation on the allotments as "4 or 5 acres where it is gravelly" (R. 308). He testified that most of the soil did not require much irrigation (R. 309).

Agatha Pablo, Michel Pablo's wife, testified that no water was used on her land (now owned by

Sterling); that she let the water run for stock and house use (R. 309).

The committee reported that Michel Pablo had constructed a ditch in 1891 for the purpose of conveying water to portions of his allotment (plaintiff's west eighty); that this ditch "has not been used for irrigation for the past ten years but has been used continuously for domestic and stock purposes; that said allotment is determined to have a valid and subsisting water right from Mud Creek to the extent of 1,000 gallons per day for domestic and stock use and that no other water right of any kind is appurtenant to this allotment" (R. 277). The committee similarly reported that the Alex Pablo allotment was entitled to 1,000 gallons per day, and that no other water right was appurtenant to it (R. 282). This report was approved by the Department of the Interior (R. 267).

When the Flathead Irrigation Project was undertaken extensive surveys were made of the reservation, including the lands for which water rights are claimed in this case. The map which is Defendants' Exhibit No. 5 was prepared from one of these surveys (R. 259). That is the same map which Michel Pablo said fairly showed the extent and location of his irrigation. This map shows that in 1910, when the survey was made, there was no irrigation on the Lizette Barnaby tract (plaintiff's east eighty); that 18 acres were poorly irrigated on the Michel Pablo eighty (plaintiff's west eighty) (R. 259). Sperry, the engineer who conducted the survey, testified that

"poorly irrigated" meant "partially irrigated" (R. 259); that when he examined the Pablo ditch in 1910 there was a flow of 38 inches; that the ditch had a capacity of 80 inches; that he never saw any evidence of irrigation on the Lizette Barnaby tract (plaintiff's east eighty) (R. 260).

Later the Commissioner of Indian Affairs appointed a board to survey all the lands of the Flathead Irrigation Project to determine which were irrigable (R. 263). The board found that 67.77 acres of the Michel Pablo allotment (plaintiff's west eighty) were irrigable (R. 251, 263). No classification of the Barnaby tract (plaintiff's east eighty) was made because the board considered it too gravelly and sandy to irrigate and because it was not in the irrigation district (R. 263).

Henry Gerharz testified that he had been on the Barnaby tract and had never seen a ditch across the land nor observed that the land had been plowed (R. 252).

Mayer, a watermaster of the Flathead Irrigation Project, testified that he had examined the Pablo ditch in 1922 and frequently since; that in 1922 the ditch had a capacity of 60 inches; that he had never seen any physical evidence that the ditch had at any time a capacity of 160 inches (R. 311).

As has been shown, the evidence introduced on behalf of the appellees, though it be accepted in its entirety, does not at all support the award by the District Court of water for the irrigation of *every single acre* of their lands. But any doubt on that

score is wholly resolved by the evidence just summarized, which is manifestly of a trustworthy character.

That evidence is conclusive that there was no irrigation on the Lizette Barnaby tract (plaintiff's east eighty) in 1910, and that there had not been any irrigation on it for many years before that. It is highly doubtful if that tract is even irrigable. As to the Michel Pablo tract (plaintiff's west eighty), and the tracts now owned by Alex Pablo and A. M. Sterling, the testimony of Michel Pablo, of Agatha Pablo, his wife, and of the government surveyors agrees that only a few acres were irrigated, or semi-irrigated, by Michel Pablo. And, it will be recalled, that is about what Alex Pablo testified himself.

B. If Michel Pablo did appropriate for the lands now owned by the appellees as much water as was awarded to them by the District Court, the use of that much water upon those lands was thereafter abandoned, and for more than the statutory prescriptive period of ten years the United States has used those waters, or part of them, adversely to the appellees.

Assignment of Errors No. 8 of the United States:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 346).

Assignment of Errors No. 5 of Henry Gerharz, Project Engineer:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 349).

Assignment of Errors No. 4 of the individual defendants:

> The Court erred in finding that the above mentioned appropriation of the waters of Mud Creek by the predecessor in interest of the plaintiff and of the defendants, Alex Pablo and A. M. Sterling, has never been abandoned (R. 351).

We have sought to show that Michel Pablo, through whom the appellees claim, did not use on the lands now owned by them waters even approaching in amount the quantity awarded to the appellees by the District Court. We will now seek to show that even if Michel Pablo did use such quantities of water, that their use on the lands now owned by the appellees was thereafter, in whole or in part, abandoned, and that for more than the statutory prescriptive period of ten years the United States, through the Flathead Irrigation Project, has used and

claimed those waters, in whole, or in part, adversely to the appellees.[8]

Jean McIntire, the plaintiff's son, testified that Moody, then Project Engineer of the Flathead Irrigation Project, told his father, when the latter first acquired the land in 1924, that the government did not recognize that he had any water right for irrigation, but only for stock and domestic purposes (R. 243–244); that since the McIntires acquired the land they have irrigated, for grazing purposes, "approximately 40 acres" of their east eighty (the Lizette Barnaby allotment), and "possibly 20 acres" of their west eighty (the Michel Pablo allotment) (R. 244–245); that the government, by means of the Pablo Feeder Canal, crossing Mud Creek, had cut off the water of Mud Creek and that the only water in Mud Creek during the irrigation season was water that seeped out of or underneath the Feeder

[8] "There seems to be no question, under the authorities, but that the right to the use of water may be acquired by prescription as against a private person, and that the lapse of time necessary to give such right is the period limited by the statute of limitations for entry upon lands." *State* v. *Quantic*, 37 Mont. 32, 54, 94 Pac. 491. Ten years is the period of limitations for the recovery of lands under the Montana statutes. Revised Codes of Montana (1935), § § 9015–9018.

Revised Codes of Montana (1935), § 7094, provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact."

Canal and water from springs (R. 336–337); that all the irrigation that had been done on the plaintiff's land was with this seepage and spring water (R. 338); that "There was no water available to irrigate these two eighties from the Pablo Ditch" (R. 338); that "There was no water in the ditch because the Government takes all the water, with the exception of that which comes out of the springs" (R. 341).

Tom Moore, testifying for Alex Pablo and A. M. Sterling, stated that he had farmed all of the tracts for which water rights are sought in this case except the Barnaby tract (plaintiff's east eighty); that he did not irrigate much of the Michel Pablo land (plaintiff's west eighty) when he was farming it; that he irrigated about 10 acres of the Alex Pablo land when he was farming it; that all of that land could be irrigated; that he had farmed the Agatha Pablo (Sterling) land since 1925, and had irrigated approximately twenty to twenty-five acres; that all but three acres of that land could be irrigated (R. 324–325).

Numerous witnesses testified for the appellants that since 1913 all of the waters of Mud Creek have been picked up by the Flathead Irrigation Project by means of the Pablo Feeder Canal and applied to irrigation on the lands of the project, except such quantities of water as were released to satisfy private water rights recognized by the government, such as the 1,000 gallons of water daily which the government concedes to the plaintiff and to Alex Pablo.

Stockton, an engineer, testified that in 1907 he drew up plans for the project for taking up all the

available water in Mud Creek and other streams on the reservation; that in 1908 he was informed that the Pablo Feeder Canal was planned to perform that function (R. 256).

Sperry, also an engineer, testified that in 1910 that part of the Pablo Feeder Canal which picks up the waters of Mud Creek was constructed (R. 258); that since 1913 all of the waters of Mud Creek have been used on land lying under the Flathead Irrigation Project except waters let go by to supply private water rights recognized by the United States (R. 259); that all of the available water is used (R. 259–260); that in 1929 or 1930 he was on these lands classifying the irrigable acreage; that he never saw any evidence of irrigation on the Lizette Barnaby tract (plaintiff's east eighty); that part of the Michel Pablo allotment was sub-irrigated and would not require any water (R. 260); that irrigation of new lands with the waters of Mud Creek through the Feeder Canal began in 1919 (R. 261).

Henry Gerharz, the Project Engineer, testified that 1,000 gallons of water a day had been delivered to Michel Pablo; that that was all he was recognized as entitled to but that he had seen more water than that on the place many times (R. 295).

Mayer, a watermaster of the Flathead Irrigation District, testified that he has visited the plaintiff's lands many times since 1922; that he has crossed the Pablo ditch several times a week during the irrigation season since 1922; that there has been very little irrigation on the land since 1922; that three years ago

(1933) there were a few little furrows plowed out from the Ditch on the plaintiff's west eighty; that two years ago there was another such ditch; that since 1922 the water in the Pablo Ditch had been used more for stock than anything else; that in 1922 the Ditch had a capacity of about 60 inches; that the Ditch was in worse shape now; that he had never seen any crops irrigated on any of the plaintiff's lands with water from the Ditch (R. 310–312).

Dellevo, one of the Commissioners of the Flathead Irrigation District, testified that the water supply of the district had been insufficient since the early twenties (R. 329); that the waters of Mud Creek have been directed into the government project system ever since the construction of the Pablo Feeder Canal (R. 330); that there is an acute shortage of water in the area in which the waters of Mud Creek are used (R. 332).

The evidence has been stated at this length to show how far short it falls of supporting the Decree of the District Court. If there was ever any substantial amount of irrigation on these lands, in the days of Michel Pablo, which, it is submitted, there was not, it is clear that such irrigation was abandoned almost in toto many years ago. All of the testimony agrees that only slight and spasmodic irrigation has occurred on these lands over the last twenty-five years. Possibly the lands are entitled to some water in excess of the 1,000 gallons daily. But clearly they are not entitled to any such quantities of water as were awarded to them by the District Court.

We wish further to call to the Court's attention the fact that the plaintiff's west eighty (the Michel Pablo tract) was included in the Flathead Irrigation District, upon the creation of the district in 1926, and has been included ever since (R. 270–271; Defendants' Exhibit No. 16, p. 6; R. 338). Although the plaintiff could have objected to the inclusion of her lands on the ground that water rights were already appurtenant thereto (Montana Rev. Code (1935), § 7169), she did not do so, nor has she ever sought by legal proceedings to have her land excluded from the district. The plaintiff has been paying the charges of the irrigation district, and these payments were not paid under protest (R. 339).

The decisions are clear that the plaintiff lost the right to object to the inclusion of her land in the district on the ground that water rights were already appurtenant thereto by her failure to urge that claim in the court proceedings which attended the creation of the district and the inclusion of her land therein. *Tomich* v. *Union Trust Co.*, 31 F. (2d) 515 (C. C. A. 9). See also *Judith Basin Land Co.* v. *Fergus County, Montana*, 50 F. (2d) 792, 793 (C. C. A. 9).

The plaintiff must, therefore, continue to pay all lawful charges assessed by the irrigation district upon her lands which are in the district, and the plaintiff is entitled, as the district has always recognized (R. 263, 339), to be furnished by the district with water for the irrigation of those lands whenever she so requests. The plaintiff thus has a water right, under

the irrigation district, for the irrigable acreage of her west eighty acres. And the decree of the District Court awards to her another and an independent right to water sufficient for the irrigation of her entire tract. In this respect, it is submitted, the decree of the District Court plainly violates the cardinal principle of water law that beneficial use limits the extent of a water right. For obviously the plaintiff cannot put to beneficial use on her west eighty double the quantity of water necessary for its irrigation.

CONCLUSION

The decree below departs from the well settled and applicable rule that the United States may not be sued without its consent. For that and the other foregoing reasons it is submitted that the decree of the trial court should be reversed with directions to dismiss the bill of complaint.

Respectfully submitted.

JOHN B. TANSIL,
United States Attorney for the District of Montana.
KENNETH R. L. SIMMONS,
District Counsel, U. S. I. I. S.,
Department of the Interior.
THOMAS E. HARRIS,
Special Attorney,
Department of Justice,
Washington, D. C.

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No. 8797

United States
Circuit Court of Appeals

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gerharz, Project Engineer of the Flathead Irrigation Project, et al.,

Appellants,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO and A. M. STERLING,

Appellees.

Brief of Appellee
AGNES McINTIRE

Elmer E. Hershey,
Attorney for Appellee.

Upon Appeals from the District Court of the United States for the District of Montana.

Filed .....

Clerk .....

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—INDEX—

BRIEF FOR AGNES McINTIRE, PLAINTIFF AND APPELLEE

STATEMENT OF THE CASE

July 16, 1855 (12 Stat., 975), a treaty was made by the United States of America, one of the defendants herein, with the chiefs, headmen and delegates of the confederated tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians on behalf and acting for said confederated tribes, whereby said confederated tribes ceded, relinquished, and conveyed to the United States all their rights, title, and interest in and to the country occupied or claimed by them, and particularly described.

There was reserved from the lands ceded, for the use and occupation of the confederated tribes entering into said Treaty, certain lands which were thereafter to be known as the Flathead Indian Reservation, with certain exclusive rights reserved to said Indians.

The Indians of said confederated tribes were encouraged to abandon their habits as a nomadic and uncivilized people and become self-supporting, agricultural, and civilized people, with permanent homes on lands thereafterwards allotted to them in severalty.

April 23, 1904 (33 Stat., 302), an Act of Congress provided for the survey and allottment of lands then embraced within the limits of the Flathead Indian Reservation.

On June 21, 1906 (34 Stat., 354), there was added by Congress of the United States to the provisions of the Act approved April 23, 1904, providing for the allott-

ment of said lands and the opening of the same for sale and disposal, Sections 17, 18, 19, and 20, Section 19 being as follows:

> "Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

Michel Pablo, an Indian, took possession of a large tract of land, and prior to 1891 (R 242) dug and constructed a large ditch from Mud Creek, a mile long, three feet wide at the bottom and about two fee deep (R 240), and carried the water to the lands in his possession, which he had fenced, and used the same in irrigating said lands and for domestic purposes.

Eighty (80) acres of this land, covered by said ditch, was allotted to Lizette Barnaby and 80 acres was allotted to Michel Pablo, and trust patents were issued to these parties for the lands so allotted, in 1908.

On October 5, 1916, a fee patent was issued to Agatha Pablo for the lands allotted to Lizette Barnaby (R 234), and on January 25, 1918, a fee patent was issued to Agatha Pablo to the land allotted to Michel Pablo (R 232).

Thereafter, by deeds, duly given, plaintiff became the owner of these lands (R 236-237-238-239).

Michel Pablo died in 1914 (R 316).

These lands are arid lands, and require water for the

proper irrigation of the same, and in order to raise crops.

August 26, 1926, the Flathead Irrigation District was created, under certain Acts of Congress (R 123-124).

About 1914, what is known as the Pablo Feeder Canal was built (R 264).

In building this Canal,

> "instructions were to find the best way to use all the water available on that project without regard to any of the rights that might have existed." (R 257).

The Pablo Feeder Canal crosses Mud Creek above the lands owned by plaintiff (R 257) and carries the waters to irrigate lands that never had any water on them before the Canal was built, and a great portion of these lands were unallotted lands, and were entered by white settlers under the Homestead Law (R 327).

No water from the Flathead Irrigation Project System has been used upon the lands of plaintiff, and no ditches have ever been dug making the water available for the irrigation of these lands (R 263-264).

The United States Reclamation Service was in charge of the Flathead Irrigation Project up to 1924, when the same was turned over to the control of the Indian Service (R 264).

In 1924, plaintiff obtained possession of the lands now owned by her, and the same has been irrigated to some extent each year since (R 244-336-337).

The west eighty is within the irrigation district, but the east or Barnaby eighty is not in the irrigation district (R 264).

Plaintiff, for a time, was not charged with any water from the Reclamation Service, but since the defendant Gerharz came in as Project Manager, plaintiff has been paying the water tax from the Reclamation Service, which water has never been furnished, in order to pay her property tax in the County and State (R 339), under the provisions of Sec. 2172.1, R. C. of Montana.

This action was commenced February 13, 1934 (R 9) and was finally tried on the second Amended Complaint, filed May 16, 1936, with the United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others, defendants.

On November 23, 1936, 19 members of the Flathead Tribe of Indians, and wards of the United States of America, defendants above named, through United States District Attorney, for the District of Montana, filed their answer to the Amended Bill of Complaint (R 118), and the other 18 defendants made no appearance.

On September 15, 1937, the decision of the Court was duly filed in said case (R 159 to 176).

Findings of Fact and Conclusions of Law were adopted and signed by the Court on November 6, 1937 (R 209 to 214).

On November 17, 1937, a Decree in this case was given by the Court and filed (R 225-226).

ARGUMENT

It must be remembered that by the treaty of July 16, 1855, the United States granted nothing to the Indians; the Indians reserved what was already theirs.

As said by the Court in Winters vs. United States 143 Fed. 740, 749

> "In conclusion, we are of the opinion that the Court below did not err in holding that 'When the Indians made the treaty to grant rights to the United States, they reserved the rights to use the waters of Milk River at least to an extent necessary to irrigate their lands.' The right so reserved continues to exist against the United States and its grantees as well as against the State and its grantees."

And again we find the Court holding in Skeem vs. United States 273 Fed. 93, 95

> "The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians. United States v. Winans, 198 U.S. 371, 25 Sup. Ct. 662, 49 L. ed. 1089; Winters v. United States, 207 U.S. 564, 28 Sup. Ct. 207, 52 L. Ed. 350."

Judge Cavanah, District Judge said in United States vs. Hibner 27 Fed. (2d) 909, 911

> "When considering the nature of the grant under consideration, we must not forget that it was not a grant to the Indians, but was one from them to the United States, and all rights not specifically granted were reserved to them. Winters v. U.S. and U.S. v. Winans, supra."

Further, Judge Cavanah said:

> "The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as

> this view is sustained in the case of Skeem v. U.S., supra, and such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians and that there should be awarded to such purchaser the same character of water right with equal priority as those of the Indians."

In building the Pablo Feeder Canal, the provisions of the Act of Congress under which it was constructed were violated at the beginning.

> "Instructions were to find the best way to use all the water available on that project, without regard to any of the rights that might have existed." (R 257)

Also, in building said Pablo Feeder Canal, Section 19, amending the Act for the survey and allottment of lands embraced within the limits of the Flathead Indian Reservation, approved April 23, 1904, (33 Stat., 302), was disregarded.

This Amendment was approved June 21, 1906 (34 Stat., 354) and is as follows:

> "Sec. 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use, or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

Michel Pablo was dead when the Pablo Feeder Canal was constructed.

VESTED RIGHTS ACQUIRED BY PLAINTIFF

The ditch carrying water to the lands of Michel Pablo was dug and the water used on the lands in his pos-

session in the irrigation of the same long prior to 1908 when the Trust Patents were issued to said Indians for the lands now owned by plaintiff.

The Act of July 26, 1866 (14 Stat., 253) provides as follows:

> "Sec. 2339. Whenever priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowleged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same:***

This is Section 2339 of the United States Compiled Statutes, 1901.

Section 2340 following, is as follows:

> "Sec. 2340. All patents granted, pro-emption or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section."

The fee patents of October 5, 1916 and January 25, 1918, gave and granted the lands,

> "together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said claimant and to the heirs and assigns of said claimant forever." (R 232-234).

When the patents issued in this case, they took effect as of the date when the right to the land was first initiated under the doctrine of relation.

U.S. vs. Hibner, supra, at page 912.

In the case of Hooks, et al, v. Kennard, et al, 114 Pac. on page 746, the Court said:

> "This Court has held in several cases that the selection of and the filing upon an allottment of land was the inception and beginning of the title of the allottees or his heirs, and that, when the patent which is only the evidence of title is issued, it relates back to the inception of the title. De Graffenreid v. Iowa Land & T. Co., 20 Okl. 687, 95 Pac. 624; Godfrey v. Iowa Land & Title Co., 21 Okl. 293, 95 Pac. 792; Irving, et al, v. Diamond, 23 Okl. 325, 100 Pac. 557."

To the same effect is the case of Wood, County Treasurer, et al, v. Gleason, et al, 140 Pac. ~~481~~ 418.

Plaintiff became the owner of the right to use the waters of Mud Creek for the irrigation of the 160 acres described in her Complaint. Beneficial use is the basis, the measure, and the limit of the right. This right is a vested property right, and dates from a time prior to 1891.

If there were any other owners to the right to use the waters of Mud Creek for a beneficial purpose, such rights would be a joint right with plaintiff, and the users thereof would be tenants in common, or joint tenants in the use of said water, and the United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others were made defendants in order that any rights of said defendants, adverse to the claim of plaintiff, might be established, fixed, and determined.

Alex Pablo and A. M. Sterling were the *only defend-*

ants who set forth and established any claim to the beneficial use of the waters of Mud Creek.

The United States of America must either claim *with* plaintiff as a joint owner or joint tenant in the beneficial use of the waters of Mud Creek or it has no interest in said waters.

> "Federal government's diversion, storage and distribution of water, at Reclamation Project, pursuant to Reclamation Act and contracts with landowners *held* not to have vested in the United States ownership of water rights which remained vested in owners as appurtenant to land wholly distinct from property of government in irrigation work." Ickes, Secretary of Interior, v. Fox et al, 57 Supreme Court Reporter, page 412.

If the United States of America is not the owner, such as would make it a joint tenant or tenant in common, then the United States is not necessarily a party, and as said in said case, Ickes v. Fox, supra, p. 417,

> "the suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of Interior from enforcing an Order, the wrongful effect of which will be to deprive respondents of vested property rights, not only acquired under Congressional acts, state laws and government contracts, but settled and determined by his predecessor in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this Court."

And citing many authorities, and continuing, said:

> "The recognized rule is made clear by what is said in the Simpson case: 'The suit rests upon the charge of abuse of power.' "

It is clearly shown, by the evidence offered, that

long prior to the passage of the Act for the survey and allottment of lands embraced within the limits of the Flathead Indian Reservation, and long prior to the commencement of any work of the Flathead Irrigation Project, and long prior to the creation of the Flathead Irrigation District, the waters of Mud Creek were being used upon land of plaintiff for irrigation purposes, and in 1908, when the lands were allotted to the Indian claimants, if not before, said water became appurtenant to the lands so allotted.

As was said by the Court in Choate vs. Trapp. Vol. 32, Supreme Court Reporter, at page 568,

> "there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. Reichart v. Felps, 6 Wall. 160 18 L. ed. 849. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka agreement, but whether they had not acquired rights under the Curtis act which are now protected by the Constitution of the United States."

Also the Court in this case, on page 570, said,

> "There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States."

It would seem that Congress, in amending the Act providing for the allottment of lands upon the Flathead Indian Reservation, had in mind this provision

when it recognized that some of the Indians might have been using some of the waters on the Flathead Indian Reservation, when it said:

> "Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, *** of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water."

This amendment was made in 1906, and Michel Pablo had built his ditch prior to 1891, and had used the water continuously in said ditch when the provisions of this amendment, opening the Reservation for allottment and sale, was passed by Congress.

It is idle now to say that the Indians on the Flathead Indian Reservation did not have the right to the use of water for the irrigation of their lands, and that no Indian had the right to appropriate any water for this purpose.

Plaintiff has upon her lands, a ditch dug by Michel Pablo, an Indian, some time prior to 1891, through which he was carrying water to the lands in his possession, and using the same for irrigation purposes.

The Court found that this use, for a beneficial purpose, should not exceed one inch to the acre, and that plaintiff was the owner of the right to the beneficial use of the water by reason of this appropriation.

Plaintiff should not be deprived of the use of said ditch and the water flowing therein under the provi-

sions of said Act, approved April 23, 1904, as amended by said Sec. 19.

Defendants *claimed* the *ownership of some* right so that these waters could be used by them.

The United States of America, Harold L. Ickes, Secretary of Interior, Henry Gerharz, Project Manager of the Flathead Irrigation Project, Flathead Irrigation District, and 37 others were made defendants in this action in order that if they had any right to the use of the waters of Mud Creek for a beneficial purpose, such right could be fixed, established and determined, and the waters divided between those entitled thereto.

Two of the defendants, only, showed any rights to the beneficial use of said water.

Defendants other than these two, made no answer, by which any water of Mud Creek could be given to them.

It was said in the North Side Canal Company vs. Twin Falls Canal Company, 12 F. (2d) 311:

> "Suit to establish right to the use of water as prior appropriator, in so far as determination of amount of water each appropriator is entitled to, is one for partition, within Judicial Code, 24 (Comp. St. 991 subd. 25) notwithstanding determination of rights of party to priority is in nature of suit to quiet title."

Title 28, Sec. 118 of U.S.C.A. provides that:

> "When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the District where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found with-

in the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found ***."

Under this Section, said Title 28, in Note 41, on page 157, we find the statement:

"A suit for partition of land comes within the class of cases specified in this section." Greeley vs. Lowe, 15 Sup. Ct. Rep. 24.

"A suit for partition is a local action, within this section, and in which any question between any of the parties, plaintiffs or defendants, affecting their rights or interests in the land may be put in issue and determined." German Savings Soc. vs. Tull 136 F 1.

RIGHTS SETTLED IN ONE ACTION

Sec. 1705 R. C. of Mont. 1935, provides:

In any action hereafter commenced for the protection of rights acquired to water under the laws of this State, the plaintiff may make any and all persons who have diverted water from the same stream or source, parties to such action, and the Court may in one Judgment settle the relative priorities and rights of all parties to such action.

Turning to the Brief of Appellant's, Flathead Irrigation District, we find the statement on page 5:

"THE ONLY QUESTION WHICH THIS APPELLANT SEEKS TO REVIEW IS WHETHER THE PLAINTIFF AND DEFENDANTS, PABLO AND STERLING, ARE ENTITLED TO WATER FROM MUD CREEK ASIDE

FROM THE RIGHTS OF THE FLATHEAD IRRIGATION PROJECT AND IF SO, THE NATURE OF THESE RIGHTS."

This statement is made again on page 13 of said Brief.

Said Brief also states that it has never been possible to create water rights with a date of priority on the Flathead Indian Reservation under the doctrine of prior appropriation.

This being true, the allegations made by defendant Henry Gerharz, Project Engineer of the Flathead Irrigation Project, in the fourth affirmative defense (R 100), and the allegations in the answer of nineteen Indians, members of the Flathead Tribe of Indians, in the fourth affirmative defense, are not true (R 116) and the Act of the Secretary of Interior, on November 25, 1921 (R 115) was without authority in granting valid and subsisting water rights from Mud Creek and its tributaries to the lands of the following defendants (R 115-116). Eleven (11) defendants are given water rights (R 116).

Evidently counsel for the Flathead Irrigation District do not agree with the counsel representing the other defendants (except Alex Pablo and A. M. Sterling), and all steps taken by the Secretary of Interior in order to comply with the provisions of the Acts of Congress of June 21, 1906, the saving clause, and of May 29, 1908 (R 115), were void and of no effect, and the order, made on November 25, 1921, where eleven defendants, out of nineteen answering defendants, were

given certain water rights (R 116), has no binding force or effect. (A conclusion with which we hardly agree, in the main.)

The Secretary of Interior could not take away from the Indians any vested rights. The giving of *acre-feet* was not authorized by any law in the State of Montana. *Acre-feet* has nothing to do with the corpus of the water. In Montana, and in the Acts of authorizing the reclamation of lands, "beneficial use is but the basis, the measure and the limit of the right," and in all these cases (R 116) the Indians mentioned would have a right to sufficient water to irrigate their lands, beneficial use being the measure of right. U.S. vs. Hibner, at page 912.

The argument on page 31 of said Brief, states:

> "It is clear from this Act that Congress intended that the rule of equality should govern on reservations, and for the purpose of providing equality, the Secretary was authorized to make rules and regulations."

This being true, the Secretary of Interior, in attempting to fix and determine the private water rights on the Flathead Indian Reservation, wherein it was found that a large number of Indians on many different streams on said reservation were entitled to different amounts of water, was without authority to so hold, and it was contrary to the intent of Congress.

On page 12 of said Brief, the admission is made that the records show certain acts of the Secretary of Interior recognizing private water rights on the reservation.

If there are private water rights on the reservation,

the private water rights of plaintiff and the private water rights of two of the answering defendants are just as sacred as others, and there is no need of pursuing this question further.

The private water rights of others which counsel recognized, is because some rights were obtained, and had become vested prior to the passage of the Act of April 23, 1904, and its amendments, opening said reservation to allotment and sale of the unallotted lands.

Again in said Brief, the statement was made:

> "THE RESERVATION WAS FOR THE BENEFIT OF THE INDIANS AS A TRIBE AND NOT AS INDIVIDUALS."

Turning to the Treaty made the 16th day of July, 1855, we find that it recognizes that some of these Indians may have made:

> "substantial improvements heretofore such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this Treaty."

Such improvement shall be valued under the direction of the President of the United States, and

> "payment made therefor in money, or improvements of an equal value be made for said Indians upon the reservation: and no Indian shall be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid."

This is part of Article II.

Article IV of said Treaty provides for the payment of money for certain years,

> "To be expended under the direction of the President in providing for their removal to the reservation, plowing up and fencing farms, building houses for them, and for such other objects as he may deem necessary."

Article V provides for the education of the Indian and furnishing them instructors in agricultural pursuits .

The plaintiff's Complaint alleges (R 74):

> "The Indians of said Confederated Tribe were encouraged to abandon their habits as a nomadic and uncivilized people and become a self-supporting agricultural and civilized people with permanent homes on lands thereafterwards to be allotted to them in severalty."

This allegation was admitted in the Answer of defendant Henry Gerharz (R 26) to the original Complaint filed.

It was also admitted in the Answer to the Amended Complaint filed by this defendant (R 90).

The Answer filed on behalf of the United States of America (R 23-24), admits nothing, and alleges nothing by which it might have any affirmative relief. Its Answer to the Amended Bill of Complaint (R 87-88) is the same.

The Answer of the nineteen Indians *admits* the said allegations contained in said Amended Complaint (R 106).

The Answer of defendant Flathead Irrigation District in effect denies this allegation.

HISTORY OF THE CONFEDERATED TRIBE OF INDIANS.

It must be born in mind that the Flathead Tribe, Kootenay Tribe and Upper Pend d'Oreilles constituted three separate tribes, and by the Treaty was known as the Flathead Nation.

The Flathead Tribe only was occupying the Bitter Root Valley and one of the objections that Chief Victor had was that he did not wish his people to be mixed up with the other tribes, and for this reason the provisions of the Treaty were made as to their remaining in the Bitter Root Valley.

These Indians in the Bitter Root Valley were many of them farmers, and in order to induce them to leave the Bitter Root Valley, and settle upon the Flathead Indian Reservation, Article XI was made a part of the agreement, and if,

> "in the judgment of the President, the Bitter Root Valley shall prove to be better adapted to the wants of the Flathead Tribe, than the General Reservation, then such portions of it as may be necessary shall be set apart as a separate Reservation for the said tribe."

Following this was the Garfield Agreement, found in Report of Commissioner of Indian Affairs, 1872, issued by Department of Interior, and the Act of June 5, 1872 (17 Stat., 226) opening the lands in the Bitter Root Valley for sale.

The Agent of the Flathead Agency on August 5, 1893, made a report which he designates as his Seventeenth Annual Report, and among other things said:

> "Nearly every head of a family on this reservation occupied definite, separate, though unallotted tracts, and their fences and boundary marks are generally respected. They live in houses, and a majority of their homes present a thrifty, farmlike appearance."

This report is plaintiff's Exhibit II in the case of J. C. Moody, etc., Appellant, Harry C. Smith, Appellee, Case No. 6784, (R 218 in said case) and we ask, that, as a Public Document, it be considered in this case.

In this case, prior to 1891, the witness, John Ashley (R 239), testified about the condition of the lands now owned by plaintiff, and in 1907 the witness, Jean McIntire, tells about this land of plaintiff being a show place on the reservation. There was a wonderful crop on the land of alsack and timothy (R 243).

This land was all fenced by Michel Pablo.

Can it now be said that these Indians had no right to occupy the lands fenced and cultivated by them, and water appropriated by them through ditches built at great expense, did not give them any vested rights? Under the doctrine of relations, the rights to the use of this water, the right to the use of these lands fenced and occupied, and the right to the homes built upon this land, would all take effect as of the date when first built.

As to the claims made on behalf of the Flathead Irrigation District, that the United States was the owner of the land and water on the Flathead Indian Reserva-

tion, we most respectfully call attention to the Act of April 23, 1904.

First we find Sec. 2 provides: "That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allottments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenays, Upper Pend d'Oreilles, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispell Indians now on the reservation, under the provisions of the allotment laws of the United States."

Then follows the disposal under the general provisions of the Homestead and other laws of the unallotted lands.

Then follows how the land shall be opened to settlement, the allotted lands being only a small part of the Flathead Indian Reservation.

Then follows who shall be entitled to enter these lands, and how the payments shall be made. The right is given to commute entries under the Homestead Law. Much land was given to the various organizations theretofore established on the Reservation.

At the end of five years, should there be any remaining and undisposed lands, they were to be sold at public auction.

Then follows provisions for the payment of lands

reserved, and then follows Section 16, which is as follows:

> "Sec. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts, mentioned in section twelve, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received."

Many amendments were thereafter made and as stated June 21, 1906, Sec. 17, 18, 19 and 20 were added, Sec. 19 containing provisions to the effect that nothing in the Act should be construed to deprive any of said Indians of the use of water appropriated and used by them for the necessary irrigation of their lands.

This provision is meaningless and of no effect, according to the Brief of the Flathead Irrigation District.

The lands of plaintiff were settled upon prior to 1891, and an allottment was approved to plaintiff's predecessors in 1908. The ditch was there and water was flowing in it, and had been flowing in it since prior to *1891.*

August 26, *1926,* the Flathead Irrigation District was organized. No ditch was ever dug to the lands of plaintiff and no water ever furnished her by the Flathead Irrigation Dsitrict. In no way were any of her

rights purchased, and yet without the payment of any sum and without the purchase of anything, this defendant now claims to have the right to the use of this water flowing in Mud Creek to the exclusion of plaintiff and claims that the Flathead Irrigation Project has a right to maintain a dam in Mud Creek so that this defendant may store water in the Pablo reservoir at all times, and entirely deprive this plaintiff of any such water, at times when she needs it and can use it for a beneficial purpose.

In the answer of defendant Henry Gerharz, Project Engineer of the Flathead Irrigation Project, in his fifth affirmative defense, the claim is made that the United States, through its Supervising Engineer of the Flathead Reclamation Project, duly authorized by the Secretary of Interior, in that behalf, to make the following appropriation of the waters of Mud Creek and its tributaries.

Then follows seven different appropriations of the waters of Mud Creek, running from 20 cubic feet per second of time to 200 cubic feet of water per second of time, five dated January 28, 1910, one dated April 4, 1913, and one April 7, 1913, and the book and page where recorded is given, in Flathead County and in Missoula County (R 102).

These appropriations made by the United States were made under the statute of 1905 (Laws of 1905, Ch. 44) which provides:

> "When the government of the United States desires to acquire the right to the use of waters flow-

> ing in natural streams in Montana, it must proceed as an individual to make an appropriation in compliance with the laws of the state. See Mettler vs. Ames Realty Co., 61 Mont. 152."

In making these appropriations, the United States does so as an individual, and not as a sovereign, and it can be joined in suits to adjudicate the water appropriated the same as any other party, and the claim made by counsel, in the Brief of Appellant, Flathead Irrigation District on page 21:

> "WE DO NOT CONTEND THAT THE UNITED STATES, AS A SOVEREIGN, HELD UNTO ITSELF THIS TITLE, BUT WE DO CLAIM THAT THE UNITED STATES, AS GUARDIAN OF THE INDIANS, HELD THIS TITLE AFTER THE EXECUTION OF THE TREATY."

may be correct, but in such a case, it is not immune from suit.

As to the Brief filed on behalf of the United States of America and other defendants, we find quite a number of apparent errors.

First, eighteen parties named in the Complaint filed *no* answer, and are *not* represented in this appeal.

It would appear in this regard that nineteen individual Indians are claiming some priorities to the waters of Mud Creek, and that eighteen defendants named are not claiming anything.

As to them, their default was duly entered prior to the trial of this action.

On page 12 and page 13 of said Brief, five questions were presented.

Answering the first question:

Many cases hold with the North Side Canal Company vs. Twin Falls Canal Company, set forth on page 9, supra:

> "Suits to establish right to the use of water as prior appropriators, in so far as determination of amount of water each appropriator is entitled to, is one for partition."

In Frost, et al, vs. Alturas Water Company, 81 Pac. 996, the Court said:

> "It is claimed that these provisions are sufficiently broad to cover a case of joinder such as the one under consideration. It has been frequently held that the appropriators and users of water from the same stream where each owned his separate land and right, could not join in an action against other appropriators and users of water from the same stream for the recovery of damages for an obstruction of their rights or an unlawful diversion of the water to their damage or prejudice; and it has been held by the same authorities that such parties had sufficient common interest that would justify them in uniting as joint plaintiffs in a suit to enjoin a continuation and repetition of such unlawful acts. Churchill v. Lauer (Cal.) 24 Pac. 107; Ronnow v. Delmue (Nev.) 41 Pac. 1074; Foreman v. Boyle (Cal.) 26 Pac. 94; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Miller v. Highland Ditch Co. (Cal.) 25 Pac. 550; Bliss on Code Pleading, 76; Kinney on Irrigation 327. See also Kennedy v. Scovil, 12 Conn. 317; May v. Parker, 12 Pick. (Mass.) 34, 22 Am. Dec. 393. The principle upon which these two distinct holdings is based seems to us clear and obvious. Farnam on Water and Water Rights, vol. 3 687b says: "The relation of prior and subsequent appropriators of the waters of a stream is

> that of *tenants in common,* the respective rights of whom a court of equity has the power to ascertain and determine, and to fix the times at which each may have the use of the water." This text appears to find support in Becker v. Marble Creek Irrigation Company (Utah) 49 Pac. 892; Frey v. Lowden (Cal.) 11 Pac. 838."

In the case of Becker vs. Marble Creek Irrigation Company, supra, at page 893, the Court said:

> "Their relation to each other would be that of tenants in common respecting the waters of the stream, and a Court of Equity has power to ascertain and determine their respective rights as to the waters therein flowing. Irrigation Company vs. Moyle 4 (Utah) 327, 9 Pac. 867; Frey vs. Lowden 70 (Cal.) 55, 11 Pac. 838; Combs vs. Slayton 19 (Or.) 99, 26 Pac. 661."

In the case of Frey et al., vs. Lowden et al., supra, the Court said:

> "Both plaintiffs and defendants derived their rights from appropriation under the statute law of the state, and, under the law, they, in the enjoyment of that right, became and were, tenants in common in the use of the flow of the stream, and entitled to appropriate from it, to the extent of their rights, in the order of time at which they had been acquired."

Section 7105, R. C. of Mont. 1935 provides that water rights be settled in one action, and the making of all persons, who have diverted waters from the same stream or source, parties to such action.

Undoubtedly all of the parties using water out of Mud Creek are joint tenants, and one action such as this can be brought, making all parties in such action. If the United States is claiming rights as a sovereign,

it can be made a defendant under Sec. 24 of the Judicial Code, supra, and if it is claiming as an individual, under certain appropriations made (R 102), then it is a proper party defendant, without reference to said Act of Congress, consenting to be sued, where the United States is a joint tenant.

Answering the second question:

It would appear that the United States is *not* an indispensible party to this action, if it does not claim, under the appropriations made, as set forth on page 102 of the Record.

See Ickes, Secretary of Interior, vs. Fox, et al., set forth on page 7 of this Brief.

Also see United States vs. Power, 94 F (2d) 783.

Answering the third question:

Private water rights have been recognized throughout the Flathead Reservation to various Indians who had acquired vested rights to the use of water prior to the opening of said reservation to allottment and sale.

Answering the fourth question:

Without dispute, the evidence discloses that the ditch by which the appropriation was made was of sufficient carrying capacity to carry the water appropriated and that said water was used for a beneficial purpose.

Answering the fifth question:

Sec. 7094, R. C. of Mont. 1935 states:

"APPROPRIATION MUST BE FOR A USEFUL PURPOSE—ABANDONMENT.

> The appropriation must be for some useful or beneficial purpose, and when the appropriator or

his successor in interest abandons and ceases to use the water for such purpose, the right ceases; but questions of abandonment shall be questions of fact, and shall be determined as other questions of fact."

"ESSENTIAL OF ABANDONMENT

Abandonment of a water right is a voluntary act, and to constitute it there must be a concurrence of act and intent—the relinquishment of possession and the intent not to resume it for a beneficial use—neither alone being sufficient to bring about its abandonment."

Thomas, et al., v. Ball et al., 66 M 161, 166, 213 P. 597.

"NO LAND QUALIFICATIONS NECESSARY FOR APPROPRIATION.

An appropriator of water need not be either an owner or in possession of land to make a valid appropriation for irrigation purposes.
Toohey vs. Campbell, 24 M 13, 17, 60 P 396.
Smith v. Denniff, 24 M 20, 27, 60 P 398.
Bailey v. Tintinger, 45 M 154, 175, 122 P 575."

In discussing this case, it must be remembered that the Act of May 29, 1908 (35 Stat., 448) was passed for the purpose of giving water to the various homesteaders and purchasers of unallotted land and provisions were made whereby the entryman of lands to be irrigated might pay for the construction, operation and maintenance of ditches used in a system of irrigation, and such water rights were to be *free to Indians,* the Indian to pay only for operation and maintenance.

The waters of Mud Creek were carried in the Pablo Feeder Canal to the Pablo Reservoir and a *large majority* of the lands to be irrigated out of this reservoir

were never allotted to Indians, but were sold under the Act opening said Reservation, and have no water rights except the surplus water after the Indian allottee is fully satisfied (R 328-239-330).

> "The land was settled up with a lot of dry land farmers." (R 329).

The Decree in this case (R 225), enjoins the Project Manager from interfering with the rights of the plaintiff, and from damming up or maintaining any dam on Mud Creek so that said water be diverted or turned from the main channel of Mud Creek in a way that those who have established their water rights would be deprived of the water necessary and required for the proper irrigation of their lands, which water is the private property of said parties, and appurtenant to their lands.

We respectfully submit that the judgment appealed from should be affirmed.

Respectfully submitted,
ELMER E. HERSHEY,
Missoula, Montana,
Attorney for Plaintiff and
Appellee, Agnes McIntire.

No. 8797

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, HAROLD L. ICKES, Secretary of the Interior, Henry Gertion Project, et al.,
tion Projec, et al.,

Appellants,

vs.

AGNES McINTIRE, FLATHEAD IRRIGATION DISTRICT, a corporation, ALEX PABLO, and A. M. STERLING,

Appellees.

FLATHEAD IRRIGATION DISTRICT, a corporation,

Appellant,

vs.

AGNES McINTIRE, ALEX PABLO, and A. M. STERLING,

Appellees.

SUPPLEMENTAL

Brief of Appellant
FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allen K. Smith,
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

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Appellees.

SUPPLEMENTAL

Brief of Appellant
FLATHEAD IRRIGATION DISTRICT

Walter L. Pope
Russell E. Smith
Allen K. Smith,
Attorneys for Appellant.

Upon Appeals from the District Court of the United States for the District of Montana.

SUPPLEMENTAL BRIEF OF APPELLANT, FLATHEAD IRRIGATION DISTRICT

Because the decision of the Supreme Court in United States vs. Powers et al, decided January 9, 1939, confirms the position taken by this appellant in the oral argument, because many months have elapsed since the hearing, and because the original brief does not fully disclose that position, counsel wish to reiterate briefly the contentions made on oral argument at the hearing of this cause and to point out the language of the Supreme Court which now gives new support to those contentions.

We therefore ask leave to file this supplemental brief.

The trial court and the respondents both proceeded upon the theory that Section 19 of the Act of Congress of June 21, 1906, (34 Stat. L. 354) authorized the private appropriation of waters. We pointed out on pages 31 to 34 of our original brief that any decree which gives to one Indian a definite amount of water with a definite priority as does the decree in this case, is a nullification of Section 7 of the Act of 1887. Such a decree does not provide for the "just and equal distribution" required by the 1887 Act;—the decree, *ex vi termini* requires an *unequal* distribution.

This section of the Act of 1887 formed the basis of the decision of the Supreme Court in the Powers case.

Throughout the entire opinion the court speaks of "equal rights." Of the 1887 Act the court says:

> "The statute itself clearly indicates Congressional recognition of *equal rights* among resident Indians." (Italics supplied).

And of the Secretary's powers the court said:

> "Certainly he could not affirmatively authorize unjust and unequal distribution."

If the secretary could not authorize an unequal distribution, how can a court decree that these respondents shall have the waters of Mud Creek, "prior to any of the rights of the United States or any other person?" (Opinion, R. 171, incorporated in Decree, R. 224, 226; See Conclusion II, R. 220). It is obvious that the doctrine of prior appropriation is absolutely inconsistent with the doctrine of equal rights.

The Supreme Court also held that the Treaty itself guaranteed that the Indians should have equal rights.

> "Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the *equal benefit* of tribal members (Winters v. United States, 207 U. S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners. The respondents' claim to the extent stated is well founded." (Italics supplied).

And further:

> "Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other

> land from participation in essential water and thereby destroy the *equal interest* guaranteed by the Treaty." (Italics supplied). U. S. v. Powers, supra.

The Crow Treaty goes no further in this respect than does the Flathead treaty, and consequently a construction of Section 19 of the Act of 1906, which permits prior appropriation on an Indian reservation, amounts to a nullification of the Flathead Treaty. Our original brief pointed out that Section 19 was a mere saving clause, and cited authorities which hold that for that reason it cannot be held to create any right of prior appropriation. The Supreme Court has now furnished a further reason why that section should not be so construed. The court says:

> "If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes."

The court will recall that in the oral argument we departed from the original brief with respect to the application of the doctrine of the Powers case to this action. We now wish to outline that argument for the court.

If this court finds that it is necessary to determine the nature and extent of respondents' righs, and if this court should find, as it did in the Powers case, that the respondents have rights equal only to the rights of other allottees on the reservation, then we wish to call to the court's attention the fact that even under a system assuring equal water rights to all of the Indians or

their successors, the United States still has the power to insist that, where that can be done, all water must be taken from the Indian irrigation system, and that charges for operation and maintenance be assessed equally. As was pointed out in our original brief herein, equality of right is not insured by simply saying that each allottee's right to the water is equal in amount to the right of each other allottee. The geographical distribution of the land on the Flathead Reservation and other reservations is such that it would be physically impossible for a majority of the Indians living within the reservation to secure water for their lands in the absence of some central irrigation system. It could not be that the United States intended to prefer those Indians who, by reason of their proximity to a stream, could secure water through a simple gravity system over those Indians living miles away from the stream. Section 7 of the Act of 1887 does not limit the allottees to equality in amount, rather it provides that the Secretary shall make rules and regulations to secure a just and equal *distribution* of the waters. For that reason we now urge, as we urged in our oral argument, that assuming that the allottees have equal rights to the use of water, still the United States as trustee had the power and the right for the purpose of equalizing the burden of distribution and providing for a just distribution, that each Indian should secure his water through the irrigation system provided, and should pay his pro rata share of the operation and

maintenance of that system. Such requirement does not conflict with Section 7 of the Act of 1887, but in reality provides the just and equal distribution required thereby.

The court should recall that in this case it is shown that the lands of the parties are susceptible to irrigation from the irrigation system. Since it is not shown that there has ever been any attempt by the respondents to secure water from that system, we say that the respondents are not entitled to any relief. This case differs from the Powers case in that all the lands here involved are irrigable from the project system (R. 262, 263, 264) whereas in the Powers case, as the Supreme Court said, none of the lands were within the ambit of the government projects. It is to be noted that respondents could quickly secure water from the government system by simply making a request therefor. (R. 262, 263, 264).

If we require that each allotment owner, regardless of his peculiar position with respect to the stream, must bear the burden of carrying the water to his own land, then we are nullifying the intent and purpose of Section 7 of the Act of 1887, for the reason that actually no Indian living more than a mile or so from the stream could possibly secure the water which was rightfully his without the aid of a central irrigation system.

We therefore ask that the court dismiss the bill of complaint in this cause for the reason that there is no

showing that the respondents have ever been denied the right to take water from the system, which under the circumstances in this case, is the only right that they have.

Respectfully submitted,

Walter L. Pope,
Russell E. Smith,
Allen K. Smith,
Attorneys for Appellant.
Flathead Irrigation District.

No. 9409

United States

Circuit Court of Appeals

For the Ninth Circuit.

BANK OF TEHACHAPI, a corporation,
Appellant,

vs.

CUMMINGS RANCH, INC., a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 9409

United States

Circuit Court of Appeals

For the Ninth Circuit.

BANK OF TEHACHAPI, a corporation,
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Appellee.

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PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HARVEY, JOHNSTON & BAKER,
C. W. JOHNSTON, Esq.,
359 Haberfelde Bldg.,
Bakersfield, California.

For Appellee:

S. L. KURLAND, Esq.,
712 Chester Williams Bldg.,
215 W. 5th Street,
Los Angeles, California.

WM. S. MARKS, Esq.,
1711 Chester Avenue,
Bakersfield, California. [1*]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California, Northern Division.

No. 4927

In Proceedings under Section 75 and 75 (s) of the Bankruptcy Act

In the Matter of

CUMMINGS RANCH, INC., a corporation,
Debtor.

ORDER OF CONCILIATION COMMISSIONER FIXING RENTAL, ETC.

The matter of fixing the rental value and approving the report of the appraiser on the property of the debtor herein having come on for hearing before the Honorable Samuel Taylor, Conciliation Commissioner, at an meeting of the creditors of said debtor held January 25, 1939, at 10 o'clock A. M. at Bakersfield, California, and William S. Marks, attorney for debtor herein appearing personally, and various creditors being personally present, and evidence on the matter having been heard and the report of the appraisers being filed and said Conciliation Commissioner being fully advised in the premises.

It is hereby ordered, adjudged and decreed as follows:

1. That the report of the appraiser heretofore appointed to appraise the property of the debtor

herein, appraising the following described property, to-wit:

> 5009 acre farm and stock ranch situate in Sections 31, T. 32 S., R. 32 E., M. D. B. & M.; and in Sections 3, 4, 5, 8, 9, 10, 14, and 16 in T. 11 N., R. 16 W., S. B. B. & M., all in Kern County, California,

at Forty thousand one hundred dollars ($40,100.00) be approved.

2. That the report of said appraiser appraising the personal property as follows, to-wit:

> Miscellaneous household goods and furnishings; 15 horses; 700 head of cattle classified as cows, bulls, 3-yr. old steers, 2 yr. old steers, yearlings, and calves; 500 head of poultry; one 1930 Model A Ford automobile; one harvester; 2 mowers; 1 hay rake; 1 tractor; 3 saddles; one radio;

at Thirty thousand five hundred sixty-five dollars ($30,565.00) be approved;

3. That all of the property of the debtor be set aside to said debtor for its use and occupancy;

4. That the reasonable rental value of the property of the debtor not [21] exempt is the sum of Seven Hundred fifty Dollars ($750.00) per annum, to be paid as follows, to-wit:

> $375.00 on July 1, 1939; and
> $375.00 on December 31, 1939,

and on the 1st day of July and the 31st day of December of each and every year hereafter com-

mencing July 1, 1939; that the said monies shall be paid to Conciliation Commissioner and shall be distributed by him as follows:

(1) To the payment of taxes, improvement liens, county and State Taxes, or assessments;

(2) That the balance to be paid to the creditors of said debtor as their priority and interest appear.

5. That all judicial action and official proceedings in any Court or under the direction of any official against the debtor or any of its property be stayed for a period of three years and that during such period of three years the debtor shall be permitted to retain possession of all or any part of said property in the custody and under the control and supervision of the Court.

Dated: Feb. 2, 1939.

SAMUEL TAYLOR
Conciliation Commissioner.

[Indorsed]: Filed Feb. 13, 1939. [22]

[Title of District Court and Cause.]

ORDER REVERSING CONCILIATION COMMISSIONER'S ORDER

The petitions for Writ of Review of Bank of Tehachapi for an order to vacate and set aside the order of the Conciliation Commissioner denying

Bank of Tehachapi motion for an order allowing the Bank to take all and any necessary steps that it might desire, to foreclose its chattel mortgage or any other steps authorized by law to enforce settlement of the notes secured by the said chattel mortgage, and to set aside the order of the Conciliation Commissioner refusing to make a recommendation to the Judge, in writing, that the petition of Cummings Ranch, Inc. be dismissed, and the recommendation of the Conciliation Commissioner to the Judge that it not be dismissed; and for an order dismissing said petition of Bankrupt, said petition for review being upon the Conciliation Commissioner's orders of January 20, 1939 and February 2, 1939, came on regularly for hearing before the above entitled Court on Monday, February 20, 1939, before the Honorable Leon R. Yankwich, C. W. Johnston appearing as attorney for the Petitioner, and William S. Marks appearing as attorney for Bankrupt, and after hearing upon said petition and argument by counsel, the same was submitted to the Court for its consideration and decision, and from the records and files in the above proceeding, and from the evidence introduced before the Conciliation Commissioner, transcripts of which evidence were forwarded with the Writ of Review, the Court finds: [23]

That the extension to debtor made by Conciliation Commissioner's order of February 2, 1939, fixing rental, would allow debtor to appropriate the property of Bank of Tehachapi, being mortgagee under

chattel mortgage, for debtor's benefit; and the Court finds that there is due to the Bank of Tehachapi upon said promissory notes certain sums of money exceeding $30,000.00, which notes are secured by a chattel mortgage covering all bankrupt's cattle, consisting of 800 or more head, branded with CL on left hip and having an ear mark of crop and hole in left ear, and shoestring in right ear, together with all increase thereof, which mortgage was recorded in Book 581, page 455 of Official Records of Kern County, California, and that there is a second lien upon said cattle, being a chattel mortgage from said bankrupt to J. J. Lopez in the sum of approximately $12,000.00, and that the appraisement made by the appraiser and approved by the Conciliation Commissioner did not appraise each article of personal property separately, and did not list and designate each kind of personal property, and that the rental value of $750.00 per year required to be paid by the bankrupt under the Conciliation Commissioner's order of February 2, 1939, fixing rental, is not a fair and reasonable rental, and that in order to protect the Bank of Tehachapi from loss under its chattel mortgage and in order to conserve the security, it is necessary that a sufficient amount of cattle be sold to net $10,000.00 to be paid to the Bank of Tehachapi within a reasonable time, which is on or before May 15, 1939.

Now, therefore, it is ordered, adjudged and decreed, as follows:

1. That the said orders of the Conciliation Commissioner above referred to and made on January 20, 1939 and February 2, 1939 be and the same are hereby reversed. [24]

2. That the Conciliation Commissioner have the appraiser, within ten days after a certified copy of this order has been delivered to the Conciliation Commissioner, appraise each and every article of personal property separately, excepting articles of the same class and nature, which can be appraised together.

3. That the Conciliation Commissioner take additional evidence as to what is the reasonable rental value of the property to be retained by the bankrupt in the custody and under the supervision and control of the Court, and make an order fixing the rental value, the same to be done within fifteen days after the date a certified copy of this order is delivered to the Conciliation Commissioner.

4. That the Conciliation Commissioner hear evidence, at the same time and place as the hearing on the reasonable rental value, as to the need of a supervisor to supervise the care of the cattle, under the order of the Court and make his recommendation.

5. That the bankrupt shall request the Conciliation Commissioner to cause to be sold at public auction a sufficient number of cattle to bring at least $10,000.00, which amount must be paid net to the Bank of Tehachapi at the time of the sale, but not later in any event than May 15, 1939, pro-

vided, however, that any cattle may be sold at private sale at any time upon request of debtor and the two mortgagees, or upon five days' notice to the mortgagees and then upon order of Court.

If the debtor fails to comply with any of the terms, conditions or provisions of this order then the Conciliation Commissioner, upon motion of the Bank of Tehachapi after not less than five days' notice upon either the bankrupt or one of the bankrupt's attorneys, shall recommend to the United States District Judge, before whom the matter is pending, that the adjudication be set aside and vacated, and that the petition of the [25] bankrupt and the debtor's petition be dismissed, and the adjudication shall then be vacated and the petition dismissed as provided by the Bankruptcy Act, or in lieu of dismissal the Bank of Tehachapi may request and the Conciliation Commissioner may recommend to the Court that the Bank of Tehachapi be permitted to take any and all necessary steps to enforce settlement of its notes by foreclosing the chattel mortgage and/or taking possession of the property mentioned in said chattel mortgage, or taking any other legal steps as provided by law.

Dated: March 2, 1939.

LEON R. YANKWICH
U. S. District Judge

Approved as to form and copy of the foregoing received this 2 day of March, 1939.

S. L. KURLAND
Attorney for Bankrupt.

[Indorsed]: Filed Mar. 2, 1939. [26]

[Title of District Court and Cause.]

PETITION FOR WRIT OF REVIEW

The petition of Bank of Tehachapi respectfully shows:

I.

That the court has heretofore found that there is due by bankrupt to the Bank of Tehachapi upon promissory notes certain sums of money exceeding $30,000.00 and that said notes are secured by chattel mortgage covering all bankrupt's cattle, consisting of eight hundred or more head branded with CL on left hip and having earmark of crop and hole in left ear and shoestring in right ear, together with increases thereof, which mortgage was recorded in Book 581, page 455, of Official Records of Kern County, California, and that there is a second mortgage on said cattle from said Bankrupt to J. J. Lopez in the sum of approximately $12,000.00.

That a transcript of the evidence and proceedings of the first meeting held on November 19, 1938 and proceedings held on January 20, 1939 has been filed with the Conciliation Commissioner and the same was forwarded to the above entitled court upon writs of review heretofore taken by the Bank of Tehachapi and reference is hereby made to the said transcripts.

II.

That at a hearing held before Samuel Taylor, Conciliation Commissioner, on Saturday, March 25, 1939, after evidence had been introduced by and on

behalf of the debtor as to the value of both the real and personal property which had been appraised by Boyce R. Fitzgerald, the appraiser appointed to appraise said property, and testimony was also introduced as to [27] the rental value of the property, the Conciliation Commissioner set aside certain property to bankrupt as exempt and thereupon the Bank of Tehachapi moved to dismiss the proceedings and for a recommendation from the Conciliation Commissioner to the Judge to dismiss the proceedings on the grounds stated in the motion, a true and correct copy of which is attached hereto and marked Exhibit "A", and thereupon the Conciliation Commissioner denied said motion and refused to recommend to the Judge of the above entitled court that the petition of Cummings Ranch, Inc. be dismissed and made his recommendation that the Judge of the above entitled court not dismiss said proceedings and thereupon said Bank of Tehachapi moved for an order that it be authorized to take any and all steps necessary to foreclose its chattel mortgage, said motion being in the form and context attached hereto and marked Exhibit "B"; and thereupon the Conciliation Commissioner denied said motion.

III.

That said order of said Conciliation Commissioner is in error for the following reasons:

1. That the debtor has not acted in good faith and is not entitled to the benefits of Subsection S of Section 75 of the Bankruptcy Act.

2. That there is no reasonable probability of ultimate debt satisfaction within the three years' period and said order does not give the Bank of Tehachapi its lien pursuant to the terms of said chattel mortgage upon said cattle.

3. That there is no emergency existing as far as the debtor is concerned nor is there any emergency existing in the locality where the debtor's ranch is located.

4. That to allow Cummings Ranch, Inc. to retain possession of the cattle when it is shown by the testimony of Cummings Ranch, Inc. that its financial condition is such that [28] it is hopeless for the debtor to ever settle its debts by any extension, and any proceedings by which the debtor is given any time to pay its debts, is to allow the debtor to appropriate the mortgagee's property for debtor's benefit.

5. That the debtor, from the testimony introduced, cannot refinance itself within a three year period, nor is there any way by which there can be financial rehabilitation of the debtor.

Wherefore, petitioner, feeling aggrieved because of such orders, prays that the same may be reversed as provided in the Bankruptcy Act of 1898 and all amendments thereto and general orders, and that an order be made setting aside and vacating said orders of said Conciliation Commissioner, and that an order be made dismissing debtor's petition and all proceedings in the above case for the reasons mentioned and enumerated in this petition

and/or that an order be made authorizing the Bank of Tehachapi to foreclose its chattel mortgage or take any other legal steps provided in said chattel mortgage to enforce payment of its indebtedness secured by said chattel mortgage.

HARVEY, JOHNSTON & BAKER
By C. W. JOHNSTON
Attorneys for Petitioner [29]

POINTS AND AUTHORITIES

I.

The court should dismiss proceedings where it is evident that rehabilitation of a farm debtor is not possible.

Wright vs. Mountain Trust Bank, 81 Law Ed. 738, 300 U. S. 440.

II.

Cannot appropriate mortgagee's property for debtor's benefit.

Louisville Bank vs. Radford, 295 U. S. 555, 79 Law Ed. 1595.

III.

Debtors must act in good faith.

See Wright vs. Mountain Trust Bank, supra, and Guarantee Mortgage Company vs. Moser, 95 Fed. (2) 944 (9th). [30]

EXHIBIT "A"

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the Bank of Tehachapi and moves the above entitled court to dismiss the petition of the above debtor for the following reasons, to-wit:

1. That there is no emergency existing as far as Cummings Ranch, Inc. is concerned.

2. That the Cummings Ranch, from the testimony in the record, shows that it will be impossible for it to refinance itself within three years and that there is no reasonable probability of ultimate debt satisfaction within the Moratorium period allowed by law.

3. That any extension given to the debtor would not give to the Bank of Tehachapi a right to retain its lien unencumbered and that the same would be and is unconstitutional in that it would permit the alleged farmer, to-wit, the Cummings Ranch, Inc. to remain in possession of cattle which are under chattel mortgage given as security to pay the debt to the Bank of Tehachapi, where it is shown by the record that the Cummings Ranch, Inc. is in such a hopeless financial condition that any extension of time would be to allow the debtor to appropriate the mortgagee's property for the debtor's benefit.

4. That there is no emergency existing in this locality and the locality where the debtor's ranch is located.

That the Conciliation Commissioner make his recommendation in writing to the Judge of the above entitled court to dis- [31] miss said petition of said Cummings Ranch, Inc. the debtor, upon the grounds and for the reasons stated in this motion.

Dated March 24, 1939.

HARVEY, JOHNSTON & BAKER
By C. W. JOHNSTON
Attorneys for Bank of Tehachapi

[32]

EXHIBIT "B"

[Title of District Court and Cause.]

MOTION FOR ORDER AUTHORIZING BANK TO FORECLOSE

Comes now the Bank of Tehachapi and moves the above entitled court for an order authorizing said bank to take any and all steps that it may desire to foreclose its chattel mortgage and/or to sell said property mentioned in said chattel mortgage as provided by said chattel mortgage and/or to take any other legal steps as provided by law so that said property mentioned in said chattel mortgage may be sold and the proceeds thereof applied upon the debts due by said debtor to said bank as mentioned in said chattel mortgage for the reason that if said debtor is allowed to retain possession of said mortgaged property, that substantial loss in value will be sustained by said bank upon its security and for the further reason that said debtor is not acting in good faith, and for the further reason that the testimony shows that it is impossible for the bankrupt to refinance itself within three years and that the bankrupt is so hopelessly involved in indebtedness that it is impossible for it to rehabilitate itself.

Dated: March 24, 1939.

HARVEY, JOHNSTON & BAKER
By C. W. JOHNSTON
Attorneys for Bank of Tehachapi

[33]

United States of America,
Southern District of California,
Northern Division,
County of Kern—ss.

C. W. Johnston being duly sworn, says: That he is one of the attorneys for the petitioner in the foregoing entitled matter and he makes this affidavit and verification for and on behalf of the Bank of Tehachapi for the reason that the facts are within his knowledge and not within the knowledge of any of the officers and agents of said Bank of Tehachapi as to some of the matters set forth in said petition for writ of review; that he has read the foregoing petition for writ of review and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true.

C. W. JOHNSTON

Subscribed and sworn to before me this 4th day of April, 1939.

[Seal] KATHERINE STAUSS
Notary Public in and for the County of Kern, State of California.

[Indorsed]: Filed May 9, 1939. [34]

[Title of District Court and Cause.]

PETITION FOR WRIT OF REVIEW

The petition of Bank of Tehachapi respectfully shows:

I.

That the court has heretofore found that there is due by bankrupt to the Bank of Tehachapi upon promissory notes certain sums of money exceeding $30,000.00 and that said notes are secured by chattel mortgage covering all bankrupt's cattle, consisting of eight hundred or more head branded with CL on left hip and having earmark of crop and hole in left ear and shoestring in right ear, together with increases thereof, which mortgage was recorded in Book 581, page 455, of Official Records of Kern County, California, and that there is a second mortgage on said cattle from said Bankrupt to J. J. Lopez in the sum of approximately $12,000.00.

That a transcript of the evidence and proceedings of the first meeting held on November 19, 1938 and proceedings held on January 20, 1939 has been filed with the Conciliation Commissioner and the same was forwarded to the above entitled court upon writs of review heretofore taken by the Bank of Tehachapi and reference is hereby made to the said transcripts.

II.

That the orders of the Conciliation Commissioner heretofore made as to rental value, upon which the

Bank of Tehachapi took a writ of review, were reversed pursuant to order of Judge Leon R. Yankwich dated March 2, 1939 and ordered the Conciliation Commissioner to take additional evidence as to what is the [35] reasonable rental value of the property to be retained by the bankrupt in the custody and under the supervision and control of the court and to make an order fixing the rental value; and thereafter, on the 5th day of April, 1939, the Conciliation Commissioner made his order, a copy of which is attached hereto and marked Exhibit "A", and that a portion of said order fixing rental value is as follows, to-wit:

> "That the reasonable rental value of the property of debtor in the sum of $6000.00 shall be paid as follows, to-wit: $10,000. to be paid on or before May 15, 1939 under order of Court in lieu of rental for the year of 1939; One half of said annual rental, or the sum of $3,000. to be paid on April 1, 1940 and the other half or $3000. to be paid on October 1, 1940, and a like amount April 1 & Oct. 1 each year thereafter."

That said order of Judge Leon R. Yankwich of March 2, 1939 further provided that,

> "in order to protect the Bank of Tehachapi from loss under its chattel mortgage and in order to conserve the security, it is necessary that a sufficient amount of cattle be sold to net $10,000.00 to be paid to the Bank of Tehachapi

within a reasonable time, which is on or before May 15, 1939."

and said order further provided,

"5. That the bankrupt shall request the Conciliation Commissioner to cause to be sold at public auction a sufficient number of cattle to bring at least $10,000.00, which amount must be paid net to the Bank of Tehachapi at the time of the sale, but not later in any event than May 15, 1939, provided, however, that any cattle may be sold at private sale at any time upon request of debtor and the two mortgagees, or upon five days' notice to the mortgagees and then upon order of Court."

III.

That said order of said Conciliation Commissioner is in error for the following reasons:

1. That the debtor has not acted in good faith and is not entitled to the benefits of Subsection S of Section 75 of the Bankruptcy Act.

2. That there is no reasonable probability of ultimate debt satisfaction within the three years' period and said order [36] does not give the Bank of Tehachapi its lien pursuant to the terms of said chattel mortgage upon said cattle.

3. That there is no emergency existing as far as the debtor is concerned nor is there any emergency existing in the locality where the debtor's ranch is located.

4. That to allow Cummings Ranch, Inc. to retain possession of the cattle when it is shown by the testimony of Cummings Ranch, Inc. that its financial condition is such that it is hopeless for the debtor to ever settle its debts by any extension, and any proceedings by which the debtor is given any time to pay its debts, is to allow the debtor to appropriate the mortgagee's property for debtor's benefit.

5. That the debtor, from the testimony introduced, cannot refinance itself within a three year period, nor is there any way by which there can be financial rehabilitation of the debtor.

6. That the order of said Conciliation Commissioner fixing rental is in violation and contrary to the order of Judge Leon R. Yankwich of March 2, 1939.

7. That said order is contrary to the provisions of subsection 2 of Section S of the Frazier-Lemke Act.

8. That said order of said Conciliation Commissioner fixing rental is void and invalid as it deprives the Bank of Tehachapi of a portion of its lien upon property for the benefit of other creditors.

Wherefore, petitioner, feeling aggrieved because of such orders, prays that the same may be reversed as provided in the Bankruptcy Act of 1898 and all amendments thereto and general orders, and that an order be made setting aside and vacating said orders

of said Conciliation Commissioner, and that an order be made dismissing debtor's petition and all proceedings in the [37] above case for the reasons mentioned and enumerated in this petition; and for such other and further relief as may be proper and just in the premises.

BANK OF TEHACHAPI,
a corporation
By ALBERT ANCKER
Petitioner.

HARVEY, JOHNSTON & BAKER
By C. W. JOHNSTON
Attorneys for Petitioner. [38]

EXHIBIT "A"

[Title of District Court and Cause.]

ORDER OF CONCILIATION COMMISSIONER APPROVING APPRAISAL AND FIXING RENTAL

The matter of fixing the rental value and approving the report of the appraiser of the property of the debtor herein, in accordance with the ruling of the Hon. Leon R. Yankwich, a judge of the above named Court, the matter having on the 2nd day of March, 1939, come up for hearing before him, and now coming on for hearing before the Hon. Samuel Taylor, Conciliation Commissioner, at a meeting called for above named purpose for the creditors of

said debtor held March 18 and 25, 1939 at 10 o'clock A. M. of said days at Bakersfield, California, and William S. Marks, attorney for debtor herein, appearing, and C. W. Johnston of Harvey, Johnston & Baker, appearing as attorney for the Bank of Tehachapi and Mrs. Chas. Asher; and Guy Greanleaf appearing for the Federal Land Bank of Berkeley and evidence on the matter having been heard and the report of the appraiser being filed, said Conciliation Commissioner being fully advised in the premises, it is hereby Ordered, Adjudged, and Decreed as follows:

1. That the report of Boyce R. Fitzgerald, appraiser, heretofore appointed to appraise the property of the debtor herein and who under said order re-appraised the following described property to-wit:

> 5009 acre farm and stock ranch situate in Sections 31, T. 32 S., R. 32 E., M. D. B. & M.; and in Sections 3, 4, 5, 8, 9, 10, 14 and 16 in T. 11 N., R. 16 W., S. B. B. & M., all in Kern County, California;

at Forty thousand one hundred dollars ($40,100.00) be approved. [39]

2. That the report of said appraiser re-appraising the personal property as follows, to-wit:

82	three year old steers, 950 lbs. @ 6½¢	$ 5022.50
56	two year old steers, 800 lbs. @ 7¢	3136.00
92	one-year old steers, 650 lbs. @ 6½¢	3887.00
260	cows, 1000 lbs. @ 4¢	10400.00
48	two year old heifers, 800 lbs. @ 4½¢	1728.00
86	one year old heifers, 600 lbs. @ 5¢	2850.00
25	bulls, 1250 lbs. @ 4¢	1000.00
50	calves, 225 lbs. @ 10¢	1125.00
20	calves, 150 lbs. @ 10¢	300.00
40	calves, @ $10.00 per head	400.00
	Miscellaneous household goods and furniture	100.00
15	horses @ $50.00 per head	750.00
500	chickens @ $1.00 per head	500.00
1	Ford Car @ $50.00	50.00
1	Harvester	100.00
2	Mowers @ $10.00	20.00
1	hay rake	10.00
1	Tractor	200.00
3	saddles @ $10.00 each	30.00
1	radio	20.00

That the total appraised value of said personal property is $31,358.50, and that the same be approved;

3. That all of the property of the debtor be set aside to said debtor for its use and occupancy for

a period of three years, subject however, to the supervision and control of the Court.

4. That said debtor has no property exempt by state law. [40]

5. That the reasonable rental value of the property of debtor is as follows, to-wit:

(1)	4409 acres of grazing land @ .25 per acre	$1102.25
(2)	400 acres of grain land @ $1.50	600.00
(3)	200 acres of irrigable land @ $2.50	500.00

making a total rental value of land of debtor in the sum of $2202.25.

(4)	230 head steers @ $2.50	575.00
(5)	260 head cows @ $2.50	650.00
(6)	134 head heifers @ $2.50	336.00
(7)	25 bulls @ $12.50	312.50
(8)	110 calves @ $3.00	330.00
(9)	15 horses @ $12.50	180.00
(10)	500 chickens @ .25	125.00
(11)	Tractor and farm implements	105.25

making a total rental value of personal property above named at $2613.75.

(12) That the rental value of Railroad Land now being used but not owned by debtor is $675.00; that the rental value of the camp and well on said premises is $125.00; and that the rental value of the McWilliams property rented but not owned by debtor is $384.00 making a total of $1184.00 rental for this land not owned.

That the reasonable rental value of the property of debtor in the sum of $6000.00 shall be paid as follows, to-wit: $10,000.00 to be paid on or before May 15, 1939 under order of Court in lieu of rental for the year of 1939; One half of said annual rental, or the sum of $3,000.00 to be paid on April 1, 1940 and the other half or $3000.00 to be paid on October 1, 1940, and a like amount April 1 and October 1 each year thereafter;

That the said monies shall be paid to the Conciliation Commissioner and shall be distributed by him as follows: [41]

(1) To the payment of State and County taxes, improvement liens, assessments, and expenses of administration;

(2) The balance is to be paid to the creditors of said debtor as their priorities and interests may appear.

That all judicial actions and proceedings in any Court or under the direction of any official against said debtor or any of its property be stayed for a period of three years and that during such period of three years the debtor shall be permitted to retain possession of all or any part of said property in the custody and under the control and supervision of the Court.

Dated: April 5, 1939.

SAMUEL TAYLOR
Conciliation Commissioner

[42]

POINTS AND AUTHORITIES

I.

The court should dismiss proceedings where it is evident that rehabilitation of a farm debtor is not possible.

Wright vs. Mountain Trust Bank, 81 Law Ed. 738, 300 U. S. 440.

II.

Cannot appropriate mortgagee's property for debtor's benefit.

Louisville Bank vs. Radford, 295 U. S. 555, 79 Law Ed. 1595.

III.

Debtors must act in good faith.

See Wright vs. Mountain Trust Bank, supra, and Guarantee Mortgage Company vs. Moser, 95 Fed. (2) 944 (9th).

IV.

The mortgagee has a right to retain its lien until the indebtedness thereby secured is paid.

See Wright vs. Mountain Trust Bank, supra. [43]

United States of America,
Southern District of California,
Northern Division,
County of Kern—ss.

Albert Ancker being duly sworn, says: That he is President of Bank of Tehachapi, a corporation,

the petitioner named in the foregoing entitled matter; that he has read the foregoing petition for writ of review and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters, that he believes it to be true.

ALBERT ANCKER

Subscribed and sworn to before me this 19th day of April, 1939.

[Seal] T. W. PLANT

Notary Public in and for the County of Kern, State of California.

My Commission expires Oct. 25, 1942.

[Indorsed]: Filed May 9, 1939. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CONCILIATION COMMISSIONER (REVIEW)

The undersigned conciliation commissioner hereby certifies as follows:

This matter has been heard upon review of my former rulings by the Honorable Leon R. Yankwich one of the Judges of this Court and due to the fact that my previous orders were set aside and new orders made by Judge Yankwich, this creditor again petitioned this court for an order dismissing these

proceedings which order was denied. My former orders denying this creditor's several motions for dismissal or permission to foreclose its chattel mortgage although set aside by Judge Yankwich were in reality sustained for the reason Judge Yankwich did not grant creditor's request for dismissal or permission to foreclose.

The creditor's present petitions to review embrace the selfsame questions previously passed upon by Judge Yankwich and are made because your commissioner's previous rulings were set aside, therefore allowing this creditor to renew his former motions and after denial reviewing the orders. The questions here involved have been passed upon by Judge Yankwich and both petitions contain the identical grounds and prayers for relief heretofore denied by Judge Yankwich upon the former hearing.

Respectfully submitted,
SAMUEL TAYLOR
Conciliation Commissioner

Bakersfield, Cal. May 6, 1939.

[Indorsed]: Filed May 9, 1939. [45]

In the District Court of the United States, for the Southern District of California, Northern Division

No. 4927

In the Matter of

CUMMINGS RANCH, INC.,
a corporation,

Bankrupt.

ORDER DENYING WRITS OF REVIEW OF BANK OF TECHACHAPI AND DENYING MOTION AND PETITION TO FORECLOSE CHATTEL MORTGAGE AND APPROVING ORDER OF CONCILIATION COMMISSIONER

The petition for writs of review of Bank of Tehachapi for an order to vacate and set aside the order of the Conciliation Commissioner denying Bank of Tehachapi's motion for an order allowing the Bank to take all and any necessary steps that it might desire to foreclose its chattel mortgage or any other steps authorized by law to enforce settlement of the notes secured by the said chattel mortgage, and to set aside an order of the Conciliation Commissioner refusing to make a recommendation to the Judge, in writing, that the petition of Cummings Ranch, Inc. be dismissed, and the recommendation of the Conciliation Commissioner to the Judge that it not be dismissed; and for an order dismissing said petition of Bankrupt, and for an

order vacating and setting aside the order of the Conciliation Commissioner approving appraisal and fixing rental, said petitions for review being upon the Bank of Tehachapi petitions dated April 4, 1939 and April 19, 1939, came on regularly for hearing before the above entitled Court on Monday, September 11, 1939, before the Honorable Leon R. Yankwich, C. W. Johnston appearing as attorney for the Petitioner, and S. L. Kurland appearing as attorney for Bankrupt, and after hearing upon said petitions and argument by counsel, the same was submitted to the Court for its consideration and decision, and from the records and files in the above proceeding and from the evidence introduced before the Conciliation Commissioner, transcripts of which evidence were heretofore forwarded with writs of review, the Court finds: [47]

I.

That the order of the above entitled Court of March 2nd, 1939 requiring the Conciliation Commissioner in the above entitled cause to cause a reappraisal to be had of the property of the Bankrupt and to take additional evidence of the reasonable rental value of the said property and to make an order fixing the rental value and to hear evidence as to the matter of a supervisor for the care of the cattle and to cause sufficient cattle to be sold to bring in at least $10,000.00 to be paid to the creditor Bank of Tehachapi has been complied with, and the findings and orders of the Commissioner as to each

of the foregoing is hereby approved except as specifically modified hereinafter.

II.

That the sum of $10,404.00 was obtained by the sale of said cattle and all of said sum was paid over by said Commissioner to the Bank of Tehachapi and is to apply on the principal of that certain promissory note of the Bankrupt to the said Bank which said note is secured by chattel mortgage on the cattle of the bankrupt corporation.

III.

That the sum of $6,000.00 is the reasonable rental value for the property of the debtor company as it existed prior to the sale of the said cattle.

IV.

That the petitions and each of them for a writ of review and for an order to vacate and set aside the order of the Conciliation Commissioner denying the Bank of Tehachapi permission to foreclose on its said chattel mortgage are each denied, and the Bank of Tehachapi is not entitled to an order of dismissal of the above entitled proceeding or an order to foreclose its chattel mortgage. [48]

Now Therefore, It Is Ordered, Adjudged and Decreed as Follows:

(1) That the Order of the Conciliation Commissioner approving the appraisal and fixing the rental is confirmed and approved, excepting only that the sum of $10,404.00 heretofore paid by the

Bankrupt Corporation to the Bank of Tehachapi pursuant to the order of the above entitled Court of March 2nd, 1939 shall be applied upon the principal of the Bank's promissory note which is secured by a chattel mortgage on the cattle of the bankrupt.

(2) That the writs of review of the Bank of Tehachapi of April 4th, 1939 and April 9th, 1939 are hereby denied, and the petition and motion to foreclose on the chattel mortgage is hereby denied; exception allowed.

Dated: October 23rd, 1939.

LEON R. YANKWICH
United States District Judge

Approved as to form and copy of the foregoing received this ..... day of October, 1939.

.....
Attorney for Bankrupt.

[Indorsed]: Filed Oct. 23, 1939. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Bank of Tehachapi, a corporation, a creditor of the above named bankrupt, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from the order denying the writs of review of April 4, 1939 and April 19, 1939, of the Bank of Tehachapi; denying the petition and motion of said Bank of Tehachapi for an order authorizing it to foreclose on its chattel

mortgage; approving the order of the Conciliation Commissioner approving appraisal and fixing rental, and denying the petition and motion of said Bank of Tehachapi to dismiss the bankruptcy petition of the above named bankrupt, which order was entered in the above bankruptcy case on the 23rd day of October, 1939.

HARVEY, JOHNSTON &
BAKER
T. N. HARVEY
J.
C. W. JOHNSTON
C. F. BAKER
J.
Attorneys for Appellant Bank of Tehachapi.
Address: 359 Haberfelde Building, Bakersfield, California.

Received copy of notice of appeal 12/6/39.
WM. S. MARKS
S. L. KURLAND
Attorneys for Debtor.

[Indorsed]: Filed Nov. 24, 1939. [50]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing pages,

numbered from 1 to 59, inclusive, contain full, true and correct copies of Petition for Review of order dated Dec. 2, 1938; Petition for Review of order dated Jan. 20, 1939; Petition for Review of order dated Feb. 2, 1939; Order of Conciliation Commissioner fixing rental; Order Reversing Conciliation Commissioner's Order; Petition for Review of order dated Mar. 25, 1939; Petition for Review of order dated April 5, 1939; Certificate of Conciliation Commissioner; Minute Order Sept. 11, 1939; Order denying petitions for review; Notice of Appeal; Appellant's Designation of contents of record on appeal; Appellee's Designation of contents of record on appeal, and Bond on Appeal, which together with Reporter's Transcripts of Testimony of Nov. 19, 1938 and Jan. 20, 1939, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Do Further Certify that the fees of the Clerk for comparing, correcting and certifying the foregoing record amount to $17.75, and that said amount has been paid me by the Appellant herein.

Witness my hand and the Seal of the District Court of the United States for the Southern District of California, this 27th day of December, A. D. 1939.

[Seal] R. S. ZIMMERMAN,
Clerk.
By EDMUND L. SMITH,
Deputy Clerk. [60]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

Bakersfield, California, November 19, 1938

This case coming on regularly at this time, for hearing, before Samuel Taylor, Esq., Conciliator, the following proceedings were had, to-wit:

The Court: In the matter of Cummings Ranch, Inc., No. 4927. Are you ready gentlemen?

Mr. Johnston: Ready for the Bank of Tehachapi.

Mr. Marks: Ready for the Petitioner.

EDWARD G. CUMMINGS

being first duly sworn testified as follows:

Mr. Johnston: What is your name?

A. Edward G. Cummings.

Q. And what connection, if any, do you have with Cummings Ranch Inc.?

A. Well I am the president of the company.

Q. How long have you been president of the company?

A. Ever since we have incorporated. I don't know just exactly how many years.

Q. Approximately how long were you incorporated? A. Ten or fifteen years or so.

Q. Are there any other officers in the corporation besides yourself?

A. Yes, my brother is secretary.

Q. And your brother, what is his name?

A. Albert.

(Testimony of Edward G. Cummings.)

Q. Are there any other officers?

A. Clarence Cummings is vice president.

Q. Any other officers?

A. Not that I know of [61]

Q. And who are the directors?

A. Well I don't remember just exactly.

Q. Have you got your books with you?

A. No, I have not.

Q. Have you got them, Mr. Marks?

Mr. Marks: No.

Mr. Johnston: We issued a request to have you bring them here this morning.

The Court: We asked them to bring them, yes. What is the purpose of the books?

Mr. Johnston: I have a right to inspect the books to find out who the stockholders and the officers are.

Mr. Marks: There is no objection, I didn't know you needed them. He asked me the day before yesterday if he should bring them and I said I didn't know that the books would be necessary. If they are not here it may be my fault. He ought to know who the directors are anyway, without the books.

A. (By the witness) Well of course I would not say right off hand, of course.

Mr. Johnston: Q. Let us go on now, and we can continue this matter and he can come down and bring the books again.

(Testimony of Edward G. Cummings.)

Q. Now does the corporation own any real property? A. Property?

Q. Real property?

A. The Cummings Ranch.

Q. And what does that consist of?

A. Farming and mountain land. [62]

Q. About five thousand acres?

A. Five thousand and nine to be exact.

Q. Are there any taxes due against that real property? A. Yes, there is some taxes.

Q. About how much?

A. Well there is delinquent taxes about two hundred and twenty five dollars, and then through Mr. Greenleaf's office they took up the other taxes, the taxes of last year, they paid them, and the second payment has not been made.

Q. You say the taxes for the fiscal year 1937-38 have been paid?

A. It is on the record there.

Q. But you never paid it—your company never paid it?

A. No—there is Two Hundred and Twenty-Five Dollars delinquent.

Q. Are there any other delinquent taxes besides those? A. Not that I know of.

Q. Have you paid any corporation franchise tax within the last few years?

A. We are all paid up on that, yes sir.

Mr. Johnston: (To Mr. Greenleaf) You represent the Federal Land Bank do you?

(Testimony of Edward G. Cummings.)

Mr. Greenleaf: I represent the Federal Bank, and the Federal Land Bank Commissioner, and it is all included in this one claim.

Mr. Johnston: Q. Mr. Cummings, I will show you a claim that has been filed by the Federal Land Bank, [63] particularly that shows an indebtedness of Twenty One Thousand Four Hundred and Sixteen Dollars and Forty-Five Cents, and also another claim of Federal Mortgage Corporation for Four Thousand Nine Hundred and Ninety Seven Dollars and Fifty-Eight Cents, and I will ask you if those amounts are approximately correct?

A. Well I couldn't say. Naturally I supposed they would be, sure. I have not checked that over, but I suppose they are all right.

Q. You have listed in your schedules that you swore to, that you owe the two banks Twenty Five Thousand Five Hundred Dollars?

A. Something like that.

Q. Is that approximately correct?

A. Yes, without the interest.

Q. Yes.

A. Something like that—I don't know.

The Court: You would not expect him to calculate the interest.

Mr. Johnston: I asked him if they were approximately correct?

A. Yes. In other words we have the commissioner's loan and the regular Loan Bank loan.

(Testimony of Edward G. Cummings.)

Q. You have stated that you owe J. J. Lopez Eleven Thousand Dollars?

A. Probably a little more, probably around Twelve Thousand with interest.

Q. Is that Mr. Lopez any relation of yours?

A. Well he is really a second cousin. I call him Uncle—strictly speaking he is a second cousin.

Q. And when did you borrow the money from Mr. Lopez?

A. Well [64] I don't know exactly, a good many years ago I borrowed some when I had to have some money to carry on, and he let me have the money. Of course I have not paid him any interest, and he never insisted on any, and was waiting until I got straightened out, and if I had any money I would give it to him.

Q. You gave him a note when you borrowed the money did you? A. Yes sir.

Q. That is the Cummings Ranch, Inc.?

A. Yes.

Q. And a Chattel Mortgage? A. Yes.

Q. On some cattle? A. Yes.

Q. And that was the Chattel Mortgage that was second to the Chattel Mortgage of the Bank of Tehachapi? A. Yes.

Q. Was that a new loan at the time you executed that note to Lopez? A. A new loan?

Q. Yes?

A. No, it was simply the money I had owed him with the interest added to it.

(Testimony of Edward G. Cummings.)

Q. It was an old loan?

A. I imagine so.

Q. Then approximately when did you start to borrow the money from Mr. Lopez, what year?

A. I don't know. It is quite a good many years ago.

Q. About when?

A. I don't know, ten years or so, more or less.

Q. Did you keep a record of it?

A. Well I kept a record more or less. I renewed the note whenever it was due, and [65] gave him another note.

Q. So it was at least ten years ago that you started it?

A. I imagine, something like that.

Q. Now when you borrowed the money from the Federal Land Bank, this Twenty Five Thousand Five Hundred Dollars, what did you do with the money you got from the Federal Land Bank?

A. I paid off the old note to Mrs. Kelly.

Q. And how much was her note?

A. A great deal more than that, I don't remember, but she was going to take that as payment for the amount we owed her.

Q. And when did you first borrow money from Mrs. Kelly?

A. Probably eight or ten years before that, and the interest——

Q. This ranch formerly belonged to your father didn't it?

(Testimony of Edward G. Cummings.)

A. Not all of it. I added to it after I came back to the ranch. I added probably half the acreage.

Q. And when did you start in the operation of the ranch up there? A. In June 1895.

Q. Did you have anybody associated with you at that time in the operation of the ranch?

A. Well, it was a family affair. Before we incorporated it we worked together.

Q. How many people were interested in it then?

A. Well at that time, before my mother and father died, they were in there, and six children, of course.

Q. Who were the children interested in it?

A. Frank, Albert, Edward, George, Clarence and Grace. [66]

Q. And are they still interested in it?

A. No, Miss Snyder, who was Grace's sister, isn't interested in it.

Q. How many are interested in it now?

A. Six.

Q. And do you each have the same interest in there? A. No.

Q. Do you have with you any record of what each has as an interest in there?

A. Yes, approximately. I originally had eleven thousand four hundred and ninety shares, and then I got thirty five hundred shares more, and that is owned with Clarence and Albert and George Cummings.

Q. Do you know how many shares you issued?

(Testimony of Edward G. Cummings.)

A. Sixty Thousand shares all together.

Q. Do your books portray what each stockholder has? A. Yes, absolutely.

Q. Now do you recall how many shares you have?

A. Eleven thousand four hundred and ninety, and thirty five hundred.

Q. Have you acquired any shares since this petition has been filed? A. No.

Q. Have you acquired any shares during the year 1938? A. No—1938, yes.

Q. When did you acquire those shares?

A. Previous to the time this was filed.

Q. How long previous to the time?

A. I don't remember just how long.

Q. Well was it a few days? A. Yes.

Q. And how much did you pay for those shares you acquired? [67]

A. One Dollar per share.

Q. And what was the purpose of your acquiring those shares?

A. Because they belonged to me for my work.

Q. How do you mean they belonged to you for your work?

A. I got them from my brother Frank who never helped any in this particular case, and he had borrowed some money previous to that, and he wanted to turn them over to me.

Q. And that was a few days before you filed this petition? A. Yes.

(Testimony of Edward G. Cummings.)

Q. What does your brother Frank do?

A. He is chief clerk of the District Attorney's office.

Q. Where? A. Los Angeles.

Q. And you paid him One Dollar a share for how many shares?

A. Thirty Six hundred, right at the transaction he owed me some money, that is the only way I got paid was by the stockholders turning over their shares, who were not interested.

Q. During the year 1938 did you receive any other shares? A. No.

Q. Was there an exchange of any shares of stock by anyone upon your books during 1938 except what you have told us about? A. No.

Q. All right now, before you got this Thirty Six Hundred shares how many shares did you have?

A. I have eleven thousand four hundred and ninety, I believe to be exact.

Q. And how many did Frank have?

A. Frank had—I don't [68] remember exactly now. I don't know whether I have a record of it here or not. I never brought the books down, but I was not instructed—well that can easily be gotten from the books. It was eleven thousand four hundred and ninety all three of us had, and then the rest of the sixty thousand was divided between the other three.

Q. Frank had eleven thousand four hundred and ninety?

(Testimony of Edward G. Cummings.)

A. No, Albert, Clarence, and Edward.

Q. And the other three had the remaining, divided among them?

A. Yes, divided equally, and I received thirty six hundred from Frank.

Q. Now I didn't get the names of the other people—you think Frank owed some—you say he worked in the district attorney's office in Los Angeles? A. Yes.

Q. And who were the other two besides yourself, Albert and Frank and Clarence?

A. Well there is Edward J., that is my son, and George Cummings.

Q. And where does Edward J. live?

A. He is in Santa Barbara.

Q. What does he do?

A. He is with the government.

Q. United States government? A. Yes.

Q. In what capacity?

A. Well I don't know, a Federal proposition of some kind I think, W. P. A. I believe.

Q. And where does George Cummings live?

A. He is practically retired, and works on the ranch, and he is on a pension. [69]

Q. He lives up on the ranch?

A. He goes back and forth from the ranch. He is pensioned, and he has a home in Los Angeles.

Q. Pensioned by whom?

A. He was a police officer.

(Testimony of Edward G. Cummings.)

Q. He was a police officer in Los Angeles and he lives in Los Angeles?

A. Well, not all the time. He divides his time between the ranch, and when he has finished with his work he goes back to Los Angeles.

Q. And what is his address in Los Angeles?

A. 1684 West Jefferson Boulevard.

Q. Now this Dollar that you paid to Frank, did you pay that by check?

A. No, I don't believe I did.

Q. Was that transfer of that stock made after the Sheriff had taken possession of your cattle up there? A. No sir, before.

Q. How many days before that?

A. I don't know, maybe a week or two, I don't know.

Q. Did you make a trip to Los Angeles to get it?

A. Yes, I went to Los Angeles and got it.

Q. Do you remember when you went down there? A. No I don't remember.

Q. Did anybody go with you?

A. No, nobody but me—nobody traveled with me.

Q. And he endorsed over—he only had it in one certificate did he?

A. That is the thirty six hundred shares? [70]

Q. Did he have separate certificates?

A. I suppose he had.

Q. Don't you know what you got?

A. I suppose so. If I had my books I could tell

(Testimony of Edward G. Cummings.)

you, but I don't remember the hundred and one questions you ask me.

Q. When you went down there, where did you meet your brother? A. In his office.

Q. At the district attorney's office?

A. Yes.

Q. And what did you say to him?

A. What did I say to him?

Q. Yes?

A. I told him I wanted him to pay me what he owed me. He said he couldn't do it, and I said I don't want you to be completely out.

Q. Did you tell him how much he owed you?

A. Yes, he owed me more money than that, but that is all he turned over to me. That is the way I wanted to do it two or three years ago. I just wanted to have it done was all.

Q. And then he endorsed a certificate for thirty six hundred shares? A. Yes.

Q. In one certificate was it?

A. Yes, I suppose so.

Q. Well don't you know?

A. Yes—as near as I remember, yes.

Q. When you started to operate the ranch up there, you and your brothers, was there any mortgage on the real property up there at that time?

A. No. We owed for some railroad land that was bought.

Q. How much approximately did you owe at that time?

(Testimony of Edward G. Cummings.)

A. That [71] is a long time ago, and I paid it up as I went along.

Q. That wasn't very much?

A. What land we had to start with except one or two homesteads, we bought from the railroad.

Q. When did you start borrowing money from the Bank of Tehachapi?

A. Well I don't know. I didn't have to borrow any for a good many years, after I went there. I ran the ranch without borrowing any money, and I had some property in Los Angeles. We had a good deal of property, and we mortgaged the ranch to save some of that—that is the way it started, in order to save the Los Angeles property we mortgaged the ranch, or gave it as security, which naturally went to mortgage.

Q. And what became of the Los Angeles property?

A. It just went like all the rest of it. We didn't save any of it, and then of course it reverted back, and they held the ranch responsible, which then, we had to do the best we could.

Q. And that was before you incorporated was it?

A. Yes.

Q. And at the time you incorporated do you know how much you owed on the ranch—that is I mean on the real property borrowed from somebody where you gave the real property as security, gave a trust deed or mortgage on the real property?

A. I can't remember those things. These trans-

(Testimony of Edward G. Cummings.)

actions were back and forth there.

Q. Did you keep any record of them?

A. Before we incorporated?

Q. At the time you incorporated?

A. I suppose there is a [72] record, I don't know.

Q. Well, I will show you here, Mr. Cummings, a statement of the financial condition of your ranch that you furnished to the Bank of Tehachapi the first part of the year 1923, and I will ask you if that is a correct statement or not?

A. I imagine so.

Mr. Johnston: I want to introduce that in evidence as Bank of Tehachapi's Exhibit 1.

The Court: Let it be introduced.

BANK OF TEHACHAPI'S EXHIBIT 1 reads as follows:

"STATEMENT CUMMINGS RANCH, INC.
Jan. 1, 1923

ASSETS

4000	acres (estimated) range, springs, Cummings creek etc. @ $10.00 per acre	$40,000
500	acres (estimated) slope for fruit etc.	12,500
500	acres (estimated) bottom lands, alfalfa, grain, reservoirs etc. @ $50.00	25,000
17	miles fence and hog fences, etc.	
18	million feet Pine Saw timber, cruised at this amount, $5.00 per M	90,000
10	million feet Live Oak saw timber, $7.00	70,000
50,000	cords oak cord wood, @ $1.00 cd.	50,000
800	head cattle, more or less	32,000
	150 head cows 3 to 8 yrs.	

[73]

(Testimony of Edward G. Cummings.)

75 steers, 2 & 3 yrs.
100 head yearling steers
150 weanling calves
100 suckling calves
33 bulls

Actual amount will over run these estimates.

50 head horses	3,750
200 hogs	2,500
Implements, equipments, etc.	3,500
	329,250

LIABILITIES

Real Estate Mtg. long time to run	$25,000	
" " " Mrs. Cummings	1,000	
Chattel mortgage on stock	15,000	
Open notes	4,250	
		45,250
		$284,000

Stock all issued and held as follows:

Edw. G. Cummings, President	11,500	shares
Albert N. Cummings, Treasurer	11,500	"
Clarence G. Cummings, Vice-Pres.	11,500	"
Geo. A. Cummings	8,500	"
Frank R. Cummings	8,500	"
Grace Snyder, Secretary	8,500	"
Total Capital Stock	60,000	"

Signed. EDW. G. CUMMINGS, Pres."

[74]

Q. I will hand you that and ask you to look at the bottom, and tell me whether that is your brother Albert's signature? A. Yes.

(Testimony of Edward G. Cummings.)

Q. Now look at that statement that you furnished the bank, that is the Cummings Ranch did, and tell me if that statement is approximately correct?

A. Well it sounds like it is all right.

Mr. Johnston: I want to introduce that as Cummings Ranch Exhibit No. 2.

The Court: Let it be introduced.

BANK OF TEHACHAPI EXHIBIT 2 reads as follows:

"Tehachapi
Kern Co. Calif.

BALANCE SHEET

CUMMINGS RANCH

December 31st, 1927

ASSETS

Live Stock	$39,625.00
Real Estate	59,600.00
Buildings	7,780.00
Implements etc.	1,421.00
Lumber and mill	6,000.00
Deficit	12,636.25
	127,062.35

[75]

Capital Stock	$60,000.00
Mtg J. W. Kelly	37,330.12
" Bank of Tehachapi	9,650.00
" Farmers & Mer. Bank	7,750.00
Note J. J. Lopez	7,000.00
" Mrs. Geo Cummings	1,000.00
" Chas. Asher	3,000.00
" Guy Guerin	200.00
Accts payable	1,132.23
	127,062.35

(Testimony of Edward G. Cummings.)

December 31st. 1928

ASSETS		LIABILITIES	
Live stock	$39,625.00	Capital stock	$60,000.00
Real Estate	59,600.00	Mtg. J. W. Kelly	37,330.12
Buildings	7,780.00	" Bank of Tehachapi	9,650.00
Implements etc.	1,421.00	" Farmers & Mer. Bank	5,550.00
Lumber and mill	6,000.00	Note J. J. Lopez	7,000.00
Deficit	10,754.12	" Mrs. Geo. Cummings	1,000.00
		" Charles Asher	3,000.00
		" Guy Guerin	200.00
		Accts payable	1,500.00
	125,180.12		125,180.12

INCOME AND EXPENDITURE ACCOUNTS

Disbursements			Income	
Rent		$1,645.92	cattle	$9,100.01
Labor		602.90	Lumber	182.10
				[76]
Gen Ranch		3,033.30	Wheat	943.60
Interest		3,410.96	Misc.	99.66
Taxes		440.72		
Wages		2,500.00		10,325.37
Depreciation:				
Cattle	$1000			
Bldg., fences, machinery	500–	1,500.00		
		13,133.50		
		10,325.37	Notes Paid	$7,255.07
			By ALBERT N. CUMMINGS	
Loss		$2,808.13	Secretary and Treasurer''	

Mr. Marks: They paid a lot of their debts since then, and that is too far back to be relevant.

(Testimony of Edward G. Cummings.)

Mr. Johnston: Q. Now you have listed in your schedules here of the Cummings Ranch, that you are indebted to the Bank of Tehachapi in the sum of Twenty Seven Thousand Six Hundred and Fifty Dollars, is that approximately correct?

A. There is something else I would like to mention. There is an eight thousand dollar note that Mr. Ancker had me sign to satisfy the Bank Commissioners, which was to lay there as just a blind, or something like that, and I didn't list that, because I didn't consider I owed the Bank that money. I have no credit for that in here.

The Court: You are not going into that, are you?

Mr. Johnston: No, there is no such note as that.

[77]

Mr. Johnston: Q. I said, Mr. Cummings, that in the schedule here you had listed as owing to the Bank of Tehachapi Twenty Seven Thousand Six Hundred and Fifty Dollars?

A. Yes, I believe that is the record, the record will show what it is.

Q. You have not figured the interest on that of course? A. I have not figured anything.

Q. And that debt is secured by a Chattel Mortgage upon your cattle? A. Yes.

Q. Now Mr. Cummings, I will show you here what purports to be a Chattel Mortgage, dated November 23, 1934, by Cummings Ranch, Inc. to the Bank of Tehachapi, and recorded in Book 581 of

(Testimony of Edward G. Cummings.)

Official Records Page 455, Kern County. I will ask you if that is the Chattel Mortgage you gave to the Bank to secure the indebtedness that I spoke about?

A. Yes.

Q. Is that the Mortgage you gave them?

A. I suppose so.

Q. It is marked down here Cummings Ranch Inc., is that your signature, Edward G. Cummings, President, and your brother's signature Albert?

A. Yes.

The Chattel Mortgage referred to above reads as follows:

"CHATTEL MORTGAGE

This Mortgage, made this 23rd day of November, 1934 by Cummings Ranch, Incorporated, a Corporation organized and existing under the laws of the State of California, [78] County of Kern, State of California, by occupation Farming-stock-raising Mortgagor,

To Bank of Tehachapi, a corporation organized under the laws of the State of California, and having its principal place of business at Tehachapi, California, County of Kern, State of California, by occupation Banking, Mortgagee,

Witnesseth: That the said Mortgagor mortgages to the said Mortgagee all that certain personal property situated and described as follows, to-wit: All of its cattle consisting of 800 or more head of stock cattle, branded as follows, to-wit: C L, being the

(Testimony of Edward G. Cummings.)

brand used and owned by the mortgagor: said brand being on the left hip and said cattle having ear mark of crop and hole in left ear, and shoe string in right ear, together with the increase thereof.

All of the cattle located on the lands and ranges owned, leased or open by the mortgagor in the County of Kern, State of California, and in particular in the neighborhood of Cummings Valley in said County.

Also as security for any further advances made by the mortgagee to the mortgagor not exceeding in amount the sum of $4,000.00 as an aggregate, which said advances shall be evidences by additional promissory note or notes, as the case may be.

As Security for the payment to Bank of Tehachapi the said Mortgagee of Twenty four thousand six hundred fifty Dollars, [79] lawful money of the United States of America, with interest at the rate of eight per cent per annum according to the terms and conditions of one certain promissory note of even date herewith, and in words and figures following, to-wit:

No.....

Tehachapi, Calif. November 23, 1934 $24,650.00

Six months afer date, without grace, for value received We promise to pay to the order of the Bank of Tehachapi at its Banking Rooms, in the Town of Tehachapi, State of California, Twenty four thousand six hundred fifty and no/100 Dollars

(Testimony of Edward G. Cummings.)

with interest from date until paid, at the rate of eight per cent per annum, said interest to be paid quarterly, and if not paid as it becomes due, to be added to the principal and become a part thereof, and bear interest at the same rate; also to pay all legal expenses and attorney's fees which may be incurred by said Bank in the collection of this note. All payments which become due by virtue hereof, are to be paid in Lawful Money of the United States.

CUMMINGS RANCH, INC.
EDWARD G. CUMMINGS,
President
ALBERT N. CUMMINGS,
Secretary

Secured by Chattel Mortgage of even date hereof.

It Is Also Agreed that if the Mortgagor shall fail to make any payments as in the promissory note provided, then the Mortgagee may take possession of the said property, using all necessary force so to do an*y* may immediately proceed to sell the same in the manner provided by law, and from the proceeds [80] pay the whole amount of said note specified, and all costs of sale, including counsel fees not exceeding a reasonable amount the amount due, paying the overplus to the said Mortgagor, all of said costs, including said counsel fees, being hereby secured.

The Said Mortgagor does hereby state, declare and warrant, that it the sole and separate owner of

(Testimony of Edward G. Cummings.)

all the within mentioned personal property and that there are no liens or incumbrances or adverse claims of any kind whatever on any part thereof.

CUMMINGS RANCH

[Seal] EDWARD G. CUMMINGS,
President

ALBERT N. CUMMINGS,
Secretary

State of California,
County of Kern—ss.

On this 29 day of January, A. D. 1935 before me, Geo. R. Burris, a Notary Public in and for said County and State, personally appeared Edward G. Cummings, Known to me to be the President of Cummings Ranch, known to me, to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

GEO. R. BURRIS,
Notary Public in and for said County and State.

My Commission Expires October 3, 1938. [81]

State of California,
County of Kern—ss.

Edward G. Cummings, President Cummings Ranch Mortgagor in the foregoing mortgage named and Albert Ancker, President, Bank of Tehachapi,

(Testimony of Edward G. Cummings.)

the mortgagee in said mortgage named, each being duly sworn, each for himself does depose and say: That the aforesaid mortgage is made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

EDWARD G. CUMMINGS
ALBERT ANCKER,
Prs.

Subscribed and Sworn to before me this 29 day of January 1935.

GEO. R. BURRIS,
Notary Public in and for said County and State.

My Commission Expires October 3, 1938.

Mortgage Chattel Cummings Ranch, Inc. To Bank of Tehachapi

Dated November 23, 1934

Order No. 11812 When recorded, please mail this instrument to Bank of Tehachapi, Tehachapi, California

Recorded at Request of Title Insurance & Trust Co. Jun 15 1935 at 9 A. M. in Book 581 of Official Records Page 455 Kern County Records,

CHAS. H. SHOMATE,
Recorder
By FRANCES ALMANN,
Deputy Recorder. [82]

(Testimony of Edward G. Cummings.)

Q. How many head of cattle do you have now, Mr. Cummings?

A. You know as much about it as I do. There was a T.B. test there, and he tested 642, I believe, probably your keeper there turned in some more. That is every thing that was counted, there was a discrepancy in the counting of 796, seven hundred three or four.

Q. The cattle that were brought down from the mountains, when you gave the T.B. test, you had about 642? A. Yes.

Q. Had you been able to get any more cattle down from the mountains besides those?

A. Yes, we got some more.

Q. Approximately how many more?

A. There is 146 at the ranch now.

Q. That is not what I asked you.

A. Let me tell you something. I brought down 512—some of those went back. The cows got separated from the calves, and they broke the fence the night they were separated from the calves and some of them got away.

Q. What you have got at the ranch and down here are the total number you have?

A. That is what we actually counted.

Q. Do you know that about fifteen head of your cattle are over at the Tejon Ranch?

A. No I didn't know—do you know they are?

Q. I am just telling you somebody told me that

(Testimony of Edward G. Cummings.)

—they said there was fifteen head over there at the Tejon Ranch.

A. Have they gathered all the cattle yet? [83]

Q. I don't know.

A. We naturally have cattle scattered around and it takes time to gather all of them up.

Q. What condition are these cattle in?

A. Well about the average condition in the fall.

Q. As a matter of fact are they not in poor condition—that is they are skinny?

A. No, not any more than I would say one year and another. If they were in poor condition I could not drive fifty miles in a day and a half which I did, in less than a day and a half, and if they were in poor condition, if you understand anything about mountain cattle they look a lot worse than they are. They are stronger than they look. These fall cattle feeding on salt grass, if they were in poor condition you could not drive them that far in a week. There are heifers in calving you have trouble with. The afterbirth spoils in them and they die. The cows more or less take care of those. The first cow I lost this year was a cow we put up here in the Field Ranch, and she stayed there two days and died. I didn't lose a cow this year from starvation.

Q. What are all of these cattle that you have approximately worth? A. I don't know.

Q. As an average, are they worth Twenty Five Dollars a head?

A. I don't know whether they would be or not.

(Testimony of Edward G. Cummings.)

I can't say. I have not tried to find out, I don't know.

Q. How many years have you been in the cattle business? [84]

A. Approximately forty-five years.

Q. And you have seen these cattle—if you were going to buy these cattle today, would you pay as high as Twenty Five Dollars a head?

A. That is a different proposition, the cattle are worth more to me.

Q. I am asking you about the value?

A. The value might be Twenty or Twenty Five Dollars. Putting them on the market it depends upon conditions.

Q. Then you would say they were worth between Twenty and Twenty Five Dollars and that would be the value of the cattle?

A. I imagine so. There might be some difference on that.

Q. Now you have listed another claim in here of Mrs. Charles Asher of Tehachapi of Seven Thousand Dollars?

A. Approximately, I don't know. The original note was something over Five Thousand Dollars.

Q. And that was for merchandise, and there is a claim filed here on a promissory note signed by the Cummings Ranch and the note is for Five Thousand Four Hundred and Fifty Six Dollars and Seventeen Cents, dated May 16, 1935. Is that the

(Testimony of Edward G. Cummings.)

same claim that you have listed here for goods, wares and merchandise from Mrs. Asher?

A. Well, I imagine that is it.

Q. The Cummings Ranch don't owe her the note as well as the account? A. Oh no.

Q. It is just this one claim?

A. That is the whole claim. The original note was about Thirteen Hundred Dollars. [85]

Q. When did you start this bill for Thirteen Hundred Dollars?

A. The record could probably tell you more.

Q. About when?

A. Well when was that, 1935, or 1936, it was five or six years before that, I guess—more than that.

Q. That started in 1928 about? A. Yes.

Q. For the purpose of the record, Mr. Marks, will you let the record show this claim filed by Mrs. Asher is for Six Thousand Nine Hundred and Eighty Three Dollars and Eighty Nine Cents.

Mr. Marks: Yes, and also that is the only claim listed in the schedule for about Seven Thousand Dollars, that amounts to the same claim.

Q. Now this Chattel Mortgage of Mr. Lopez, is that on the same cattle that the Bank of Tehachapi has a Chattel Mortgage—he doesn't have any additional cattle on his mortgage does he?

A. No.

Q. And his mortgage was given after the Bank of Tehachapi mortgage? A. Sure.

(Testimony of Edward G. Cummings.)

Q. Now is there any other indebtedness that the Cummings Ranch owes besides what you have listed here in your schedule?

A. There may be some. Just like that Eight Thousand Dollars, I don't know whether it is an indebtedness or what you call it. They have a note —that is like taking candy from a baby, and I had to do it. There are a few little bills, of course, that are unpaid. [86]

Q. You have listed in your schedule household furniture belonging to the corporation, is that right? A. Yes.

Q. Owned by this corporation? A. Yes.

Q. Now will the Cummings Ranch need any money in its operations here to feed the cattle?

A. Well as far as feeding, I have hay there for the cattle that are weaned, and as soon as they are weaned I had to bring them down to this winter ranch.

Q. Have you paid the rent for the winter ranch?

A. I paid the railroad for half the rent.

Q. How much was the rent from the railroad?

A. Half of Three Twenty Eight.

Q. And then do you have a summer ranch besides that? A. Another ranch?

Q. That is from a man named McWilliams?

A. Yes.

Q. And that costs you Five Hundred Dollars?

A. Yes, probably less.

(Testimony of Edward G. Cummings.)

Q. And the ranch you spoke of is in Kern County, at Bakersfield? A. Yes.

Q. About where?

A. Well, it is practically twelve miles south and three miles east is where it starts, and then it runs in a southerly direction about ten miles off and on that is the division fences.

Q. Now do you have to have any person in charge out there?

A. Yes, I have a man that takes care of it. [87]

Q. And what does that cost?

A. Fifty Dollars and month and fare.

Q. Besides the expense you have enumerated will there be any other additional expense?

A. Not that I know of. If I had the means I would probably give them some more care on until spring. If we have a decent spring—I never have had to feed them anything else for twenty five or thirty years I have never had to feed them any hay.

Q. Now I would like to know when you can bring these books down—how often do you come down here Mr. Cummings?

A. Well whenever I have to is all.

Q. Don't you come down here to inspect your cattle every day? A. Every other day.

Q. When will be the next time that you have to look at your cattle? A. Friday I guess.

Q. Can you make it next Tuesday?

A. Yes, I can if it is necessary.

(Testimony of Edward G. Cummings.)

Q. I probably won't want to examine him after I look at the books. What time will be convenient for you?

A. Ten o'clock or whatever time the Court says, whatever is agreeable to the rest of you.

Q. Is 10 o'clock convenient for you?

A. Yes.

Mr. Johnston: I want you to bring down your stock books and stock certificates and all of your books pertaining to the corporation. [88]

Cross Examination

By Mr. Marks:

Q. Mr. Cummings, your brother Albert keeps these books doesn't he? A. Yes.

Q. Wouldn't Albert be able to explain them better than you?

A. I can bring them down and I can tell you about them.

Q. The cattle on the ranch they scatter pretty much over the mountains do they not?

A. Yes.

Q. And there may be fifteen or more head at the Tejon Ranch?

A. It is possible. They drift down there, and of course when the snow comes on they naturally drift home or the other way—they probably will drift back to the camp.

Q. What would be the estimate of the number that might turn up other than those you have reported here today?

(Testimony of Edward G. Cummings.)

A. There is always less. The trucks kill them on the road, I imagine they do, because I found about sixteen of these heifers died from natural causes, and some I found on the road. One had a broken leg and another was tangled in the brush there, and was practically dead when I found him. Offsetting those, the brand I have had—and I sold about twelve head because my brother was sick in the hospital, and I sold a few head now and then, to keep him there, and the last five I sold and turned the money into the bank, so I imagine between what I have sold and what I have counted dead, and maybe there may be a few left that will offset the amount that are branded, so [89] there should be the same amount we counted last spring.

Q. How many would you estimate will show up after this that you have not got at the Tejon Ranch or some other ranch?

A. There may be another fifteen scattered around the ranch when we came down with the cattle. I know the cows broke the fence and went back to the calves, so there may be a few head.

Q. There always does show up a number of cattle after the snow drives them out of the mountains?

A. If you are gathering your cattle on the ranch you can pick them up for three years after. They are not like cattle in a pasture.

Mr. Marks: That is all.

Mr. Johnston: That is all.

Mr. Johnston: Will you swear Mr. Ancker.

ALBERT ANCKER

called as a witness, being first duly sworn, testified on direct examination as follows:

Mr. Johnston: Q. Your name is Albert Ancker?

A. Yes sir.

Mr. Marks: I want to ask Mr. Cummings another question.

Q. (To Mr. Cummings) I understand there is a school teacher the Bank has been collecting money from, where you claim there was no liability on your part? A. Yes.

Q. About how much money has been collected on that?

A. Well [90] they had me charged with Sixty Five Dollars not three years ago, and I have been paying compound interest on it. I don't know how many notes I paid for somebody else.

Mr. Marks: That is all.

Mr. Johnston: Q. (To Mr. Ancker) You are the president of the Bank of Tehachapi?

A. Yes sir.

Q. And you are familiar with the loan records of the Bank of Tehachapi on loans made to the Cummings Ranch? A. Yes.

Q. Have you a list of the loans there?

A. Yes.

Q. All right now, I will ask you if your Bank Record shows that the Cummings Ranch is indebted

(Testimony of Albert Ancker.)

to you in the sum of Twenty Seven Thousand Seven Hundred and Thirty Five Dollars principal?

A. Yes sir.

Q. And then the interest up to approximately last October amounts to about Twenty One Hundred and Ninety Three Dollars?

A. Some of it in November, October and November, yes.

Q. You don't claim any additional amount from the Cummings Ranch at all, except this above mentioned? A. That is all.

Mr. Johnston: That is all.

Mr. Johnston: For the purpose of the record it is stipulated that the Cummings Ranch, Inc., proposal, may be read into the record.

Mr. Marks: Yes. [91]

"[Title of District Court and Cause.]

PROPOSAL FOR COMPOSITION OR EXTENSION

To The Honorable Samuel Taylor, Conciliation Commissioner:

The following proposal for composition or extension is hereby submitted and offered by the petitioning debtor herein:

First: That debtor will continue to operate its farm and stock ranch, described as follows, to-wit:

5009 Acre farm and stock ranch situate in Sec-

tion 31, T. 32., R. 32 E, M.D.B.&M.; and in Sections 3, 4, 5, 8, 9, 10, 14, and 16 in T. 11 N., R. 16W., S.B.B.&M., for a period of ten years from date of confirmation by the Court of agreement for composition or extension based upon this proposal.

Second: That from the gross income received therefrom there shall be first paid all necessary operating expenses in connection with the operation of said farm and stock ranch, and such sums as may be allowed by the Court and/or Conciliation Commissioner to debtor's attorney for [92] attorneys fees and Court expenses and current taxes and payments of delinquent taxes under the following plan.

Third: That debtor will pay to the County of Kern, State of California all delinquent taxes before Oct. 1st, 1939, and will pay any other taxes that may be assessed before same become delinquent, or before said date.

Fourth: That debtor will pay to the Federal Land Bank of Berkeley, Berkeley, California, the indebtedness due it of approximately $20,000. at the rate and at the time payments may become due with the rate of interest prescribed in said mortgage on real estate which payments with interest annually is approximately $1000.

Fifth: That debtor will pay to the Federal Land Bank of Berkeley, Berkeley, California, on the Commissioner's Loan in the sum of $5000.00, the sum of $1000. annually together with interest thereon as provided in said loan, payments to begin on or before Oct. 1, 1939.

Sixth: That debtor will pay to the Bank of Tehachapi of Tehachapi, California, the sum of $18,000. with interest thereon at the rate of 5% per annum within a period of 10 years, payments to be made in the sum of $1800. annually with interest at 5% on deferred payments during said 10 year period. Payments to begin on or before Oct. 1, 1939.

Seventh: That debtor will pay to J. J. Lopez the sum of $3000. within 10 years, same to be paid at the rate of [93] $300. per year with 5% interest on deferred payments, first payment to be made on or before Oct. 1, 1939.

Eighth: That debtor will pay to Mrs. Charles Asher the sum of $2000. within 10 years, said amount to be paid at the rate of $200. per year with interest at 5% on deferred payments, the first payment to be made on or before Oct. 1, 1939.

Ninth: That any other payments for any other indebtedness that may be due will be paid, after a 50% reduction in amount, at the rate of one-tenth each year, with interest thereon at the rate of 5%, payments to begin on or before Oct. 1, 1939.

Tenth: That the Conciliation Commissioner shall retain jurisdiction of this matter and all claims herein set out during said ten year period or until such time as such respective claims shall be fully paid.

Dated: November 19, 1938.

CUMMINGS RANCH
EDW. G. CUMMINGS, Pres
Petitioner

State of California,
County of Kern—ss.

Edward G. Cummings, President of Cummings Ranch, Inc., a corporation being first duly sworn, deposes and says: That he has read the foregoing proposal for composition and Extension and knows the contents thereof, and that all of the [94] matters and allegations therein contained are true of his own knowledge, and that he verifies this proposal for and in behalf of the Cummings Ranch, Inc., a corporation.

EDW. G. CUMMINGS

Subscribed and sworn to before me this 19 day of November, 1938.

[Seal] WM. S. MARKS.

Notary Public in and for the County of Kern, State of California,"

Mr. Johnston: I represent the Bank of Tehachapi, and the claim on file from Mrs. Asher designates Mr. Albert Ancker as attorney in fact in connection with this hearing, and other hearings, and as far as the Bank of Tehachapi is concerned they will not accept this offer or proposal for extension, and as far as Mrs. Asher is concerned, Mr. Ancker states she will not accept it.

The Court: The indebtedness to the Bank is approximately Thirty Thousand Dollars or thereabouts, and Mrs. Asher Seven Thousand Dollars or

thereabouts. That makes Thirty Seven Thousand Dollars. That is in excess of Thirty Seven Thousand Four Hundred and Fourteen Dollars and Six Cents, against Twenty Nine Thousand Nine Hundred and Twenty Eight Dollars and Forty Two Cents, and Mrs. Ashers is Sixty Nine Hundred Eighty Three Dollars and Eighty Nine Cents. If the Federal Land Banks accepts the proposal.

Mr. Greenleaf: The attorney for the Bank of [95] Tehachapi has requested a continuance until Tuesday to bring these books down, and I am going to ask for a continuance until Wednesday for a reply from my Bank at Berkeley.

Mr. Johnston: At this time I move the Court to dismiss the proceedings and the petition filed by Cummings Ranch, Inc., for the following reasons, to-wit,

First: That there is no emergency existing as far as Cummings Ranch, Inc., is concerned.

Second: That the Cummings Ranch from the testimony in the record, shows that it will be impossible for it to refinance itself within three years.

Third: That the plan or the proposal for composition or extension submitted by Cummings Ranch is not feasible.

Fourth: That the proposal for composition and extension made is not made in good faith, but is a mere gesture, and that there is no reasonable prob-

ability of ultimate debt satisfaction within the moratorium period allowed by law.

Fifth: That the proposal for composition and extension does not give to the Bank of Tehachapi a right to retain its lien unencumbered.

Sixth: That the proposal for composition or extension so submitted by Cummings Ranch, Inc., is unconstitutional, in that it permits the alleged farmer, to-wit, the [96] Cummings Ranch, Inc., to remain in possession of the cattle which are under Chattel Mortgage given as security to pay the debt to the Bank of Tehachapi, where it is shown by the record that the Cummings Ranch, Inc.; is in such a hopeless financial condition that any extension of time would be to allow the debtor to appropriate the Mortgagee's property for the debtors benefit.

Mr. Johnston: I would like to ask a few more questions when the books are presented.

The Court: There is a motion now for a dismissal of the proceedings.

Mr. Marks: I want to ask him two or three questions.

Q. How do you estimate you can probably take care of this in three years or refinance yourself?

Mr. Johnston: Objected to as leading and suggestive. Let him ask what he can do in the next three years regarding financing, and let him explain.

Mr. Marks: You ask him the question yourself.

Mr. Marks: Q. I will ask you first how do you figure that within three years you can refinance it and then also within ten years, how do you think you can take care of it under this proposal?

The Court: I don't see where this three year proposition comes in?

Mr. Marks: There is no such proposition that he has [97] to refinance or do anything within three years.

The Court: I know, but he is using some verbage there that apprehends that the man must pay out in three years—in this proposal—he makes his proposal in good faith, and it is for the creditors to object or accept.

Mr. Marks: I will withdraw the question.

Mr. Marks: We propose that the Cummings Ranch has a saw mill on his place, which can be adjusted and operated in a way that in three years he can pay most of any indebtedness or all of the indebtedness against him.

Mr. Johnston: What are you doing, Mr. Marks, testifying?

Mr. Marks: Mr. Taylor won't let me show it.

The Court: I am not telling you you can't put it in.

Mr. Marks: I will withdraw it.

The Court: I want to rule on this motion. The first one was on the ground that the proposal does not——

Mr. Johnston: If you will continue this until Tuesday I will have the reporter write that up and give you a copy, and you can make your ruling at that time.

The Court: All right, we will continue this matter until Tuesday at 10 A. M. [98]

Bakersfield, California, November 22, 1938.

This case coming on regularly at this time, after a continuance from November 19, 1938, and all parties being present in Court, the following proceedings were had to-wit:

The Court: In the matter of Cummings Ranch, Inc., let the record show Mr. C. W. Johnston is appearing for the Bank of Tehachapi, William S. Marks, Esq., for the Cummings Ranch, Inc., and

EDWARD G. CUMMINGS

is present in Court.

Mr. Johnston: I had the Chattel Mortgage introduced for identification. I want it introduced into the record at this time.

Mr. Johnston: Q. Mr. Cummings, you have listed certain property in the Bankruptcy Petition, have you not? A. Yes.

Q. And you have set forth after each particular piece of property, the approximate value have you not? A. More or less, yes.

Q. When I say approximate, I mean it is approximately what the value is, is that correct?

A. More or less.

Q. What do you mean by more or less?

A. I can't say exactly—the prices change—there are variations.

Q. For instance, you mention in here one model T Ford, Fifty Dollars, that is the approximate value? A. Yes.

(Testimony of Edward G. Cummings.)

Q. All the property that you have listed in here you put the approximate value after that?

A. Yes. [99]

Q. And the debts that you have listed in the schedule you put the approximate value of those?

A. Just as near as I could do it—I didn't know the actual amount of each debt.

Q. Now has the corporation receieved any income in the last year at all except from sale of cattle?

A. Last year we didn't sell—we sold a few cattle.

Q. But outside of that you have not received any income?

A. Nothing more than the living expenses from the chickens is about all.

Q. Have you received in the last five years any income, that is the corporation, except from the sale of cattle?

A. Yes, off and on we have a little revenue from the lumber business, and small affairs, people come and buy a little dry wood, a Dollar or Two a cord.

Q. That would not amount to over a Hundred Dollars a year would it?

A. The lumber would, but the revenue I turned in to the corporation.

Mr. Johnston: That is all

Mr. Johnston: I had a motion here.

The Court: I want to study it.

(Testimony of Edward G. Cummings.)

Mr. Johnston: In addition to that motion I want to include another paragraph, number seven: There is no emergency existing in this locality or in the locality where the debtor's ranch property is located.

Mr. Johnston: That is all. [100]

Cross Examination

By Mr. Marks

Q. Now Mr. Cummings, what means have you upon which you have based your calculations in paying this indebtedness off in three years or in ten years for that matter?

A. Well up to now of course we all know that three or four years ago the cattle business was in very bad shape. The government killed a lot of cattle.

Mr. Johnston: Objected to as not responsive to the question.

The Court: Let him continue.

A. I have got them back now to where I should brand a hundred and seventy five or two hundred head of cattle, and that would justify me in selling at least one hundred and fifty head for beef, and not selling any cattle this year I have them up to three years old, where they are easily fed, they may be fattened and I could put them on the market and they would bring more money.

(Testimony of Edward G. Cummings.)

Q. What can you get for what you expect to sell next year?

A. I think Eighty Dollars would be a fair estimate.

Q. And how many head?

A. One hundred head, or four carloads, about one hundred and eight heads. I imagine eight to ten thousand dollars the coming year would be a fair estimate of what I can get.

Q. And the lumber business have you any prospective money that may be obtained from the sale of lumber?

A. Well, we [101] have forced the contract—Mr. Greenleaf has the contract that calls for Eight Thousand Dollars a year for the first two years. Of course this year I know we can't get that, and they are asking me to give them more time with the understanding that they may be able to get somebody capable of running the mill for the next year.

Q. Is there a reasonable chance of securing Six or Eight or Ten Thousand Dollars?

A. We have the equipment in the mill that would justify that. We are going on the contract of Four Dollars a thousand for the standing pine.

Mr. Johnston: How many people in the last two years have tried to operate this so called lumber mill that you've got up there—there have been three people up there haven't there trying to operate this lumber mill? A. Yes.

(Testimony of Edward G. Cummings.)

Q. And you and your brothers and sisters and some other people used to be interested in a corporation that you formed to cut lumber up there and sell it? A. No.

Q. Wasn't Mr. Lopez interested?

A. Yes, that Lopez is another Mr. Lopez. He is a cousin. He is the one that originated the first mill that broke down.

Q. They went broke operating the mill didn't they?

A. I guess so. They never had any experience. There has not been one man that has gone up there with sufficient money to operate the saw mill. You have to have time to dry the lumber, and to carry a big payroll. Lopez had never seen a sawmill, [102] and it was turned back to the ranch, and these people put their own sawmill on there, Mr. Hazelton and another man. Of course the market went against them, and they closed down. They didn't go broke, and then they sold out to Styler, who didn't know anything about the mill, but he had confidence in this man Smith, and Smith threw him down and started operating in the middle of the mountain, and when he spent too much money he just closed down. He didn't go broke. The mill is there and the timber is there and in good shape to start in again. It is just a question of getting someone who can run it. With the price of lumber and the amount of lumber that is required there is no reason why we cannot make some money.

(Testimony of Edward G. Cummings.)

Mr. Marks: You say considerable of that indebtedness was incurred to purchase certain Los Angeles property that was not profitable?

Mr. Johnston: He said paying off loans.

Mr. Marks: Did you spend any sums in paying out or acquiring interest of any parties in the property?

A. I did. After my father died my mother had her interest there, and it cost we estimate about Twelve Thousand Dollars to buy her out, and that was added to what we already owed.

Mr. Johnston: When was this that you did all this?

A. Well my father died about thirty three years ago.

Q. That was before you formed this corporation wasn't it? [103] A. Yes.

Q. And all of that money was expended a long time before you started in on this corporation?

A. I understood the other day you asked me the question how did we get in debt?

Q. I asked you about 1922?

A. That started the whole thing, of course.

Mr. Marks: Was that Twelve Thousand Dollars before 1922?

A. Well I wouldn't say off hand. It was around there sometime.

The Court: That is all too remote.

Mr. Johnston: That is all.

(Testimony of Edward G. Cummings.)

The Court: The motion for dismissal stands submitted.

Mr. Johnston: How about the proposal for composition and extension—the Bank of Tehachapi and Mrs. Asher refuse to accept the proposal—that is more than fifty one percent.

The Court: The Bank of Tehachapi and Mrs. Asher?

Mr. Johnston: Yes.

The Court: No.

Mr. Johnston: The Bank of Tehachapi has *estended*——

The Court: (Interrupting) Any claim will have to be allowed before it becomes a claim. It has to be proven first.

A. How about these cattle they lost, after they had them in their possession. They lost four cows and a calf.

The Court: We will wait until the proposition has been submitted to Mr. Greenleaf's clients. That is all. [104]

State of California
County of Kern—ss.

I, Nellie G. Denslow, Do Hereby Certify, that I am the Official Phonographic Reporter of the Superior Court of the State of California, in and for the County of Kern, Department 2 thereof; that before the commencement of the within proceedings, I was duly sworn to act as Official Reporter for the

(Testimony of Edward G. Cummings.)

within-named Court, by Samuel Taylor, Conciliator; that I reported in shorthand writing the proceedings had and testimony given at the hearing of the Matter entitled as upon the first page hereof, and thereafter transcribed the same into typewriting; that the foregoing and annexed pages contain a full, true and correct statement of the proceedings had and testimony taken at the hearing of said Matter, and a full, true and correct transcript of my shorthand notes taken of the proceedings had and testimony given thereat.

Dated: December 7, 1938.

NELLIE G. DENSLOW
Official Reporter

[Endorsed]: Filed Dec. 30, 1938. [105]

[Title of District Court and Cause.]

Bakersfield, California, January 20, 1939

HEARING ON PETITION FOR APPOINTMENT OF SUPERVISOR AND TO PLACE PROPERTY UNDER CONTROL OF COURT.

TESTIMONY

EDWARD G. CUMMINGS

Direct Examination

Q. How many more cattle have you then, do you know?

A. Well I can't tell any more, I know I got 705 branded and I counted 70 that were not branded.

RUSSELL HILL,

called as a witness on behalf of the petitioner and having been duly sworn testified as follows:

Direct Examination

By Mr. Johnston

Q. What is your name? A. Russell Hill.

Q. Where do you live? A. Keene.

Q. What is your business or occupation?

A. Ranching.

Q. How long have you been in the ranching business? A. Oh, thirty years.

Q. Do you operate a ranch of your own now?

A. A farm.

Q. You handle a ranch for someone else?

A. Yes.

Q. Who is that? A. Mr. Crofton.

Q. What is the size of that ranch, about?

A. 96,000 acres.

Mr. Marks: How many acres? A. 96,000.

Mr. Johnston: Q. And it has cattle on it?

A. Yes, sir.

Q. And you know Mr. Cummings here, don't you? A. Yes, sir.

Q. And you know the ranch that is called the Cummings Ranch up there, don't you?

A. Yes, sir.

Q. And are you familiar with the property that he leases out here near Bakersfield, that he puts his cattle on in the winter time? A. Yes, sir.

(Testimony of Russell Hill.)

Q. How long have you known the Cummings Ranch property? A. Oh, thirty-five years.

Q. Do you recall along this fall when Mr. Gregory or Dr. Gregory was testing the cattle for tuberculosis? A. Yes, sir.

Q. And they were being brought down from the mountains? A. Yes, sir.

Q. And you saw his cattle at that time?

A. I did, yes.

Q. Or the cattle owned by Cummings Ranch?

A. Yes.

Q. What condition were the cattle in at that time?

A. Part of them were fairly good shape and there were some thin ones.

Q. Were there any in bad condition?

A. There were some in bad condition, yes sir.

Q. And what would you say was the cause of those cattle being in bad condition?

A. Well, they had calves, they had calves sucking them and they should have been moved a little earlier.

Q. The Cummings Ranch property is mostly hilly property, isn't it? A. Yes, sir.

Q. And is there sufficient grass on there to graze cattle the year round?

A. Not the year round, no.

Q. About how long can you graze them there in the summer assuming you had about 700 head?

(Testimony of Russell Hill.)

A. About five months, four and a half to five months.

Q. And when should they bring them off the range up there in the fall?

A. Ordinarily about from the 1st to the 15th of September.

Q. On an average with the 700 head of cattle that Mr. Cummings has, or rather the Cummings Ranch has, with the present set-up of the property up in the mountains and this he leases down here, what, on an average, would be the approximate gross income that could be made by the Cummings Ranch per year?

A. You mean if you run the 700 head?

Q. Yes, if you run the 700 head up on the range there in the summer and brought them down here in the winter, figuring the increases, what would be each year the approximate gross income?

Mr. Marks: I think he ought to show first he knows about the kind of range there is here and on the Cummings Ranch.

Mr. Johnston: He says he has been familiar with it for thirty years.

Mr. Marks: This down here the same, where they are raised down here the same?

The Court: No controversy over the feed, he is asking him if he knows how much money the Cummings ranch people can make off of their cattle each year. You think you are qualified to answer that, Mr. Hill, that question? You don't keep in

(Testimony of Russell Hill.)

close touch with the Cummings Ranch cattle, do you?

A. Well, I have seen them go back and forth.

Q. You have made no survey of them, did you?

A. Back and forth, being neighbors.

Q. You haven't counted them?

A. No, I didn't count them.

Q. Then you don't know how much increase they have unless you knew the amount of cows he had.

Mr. Johnston: Well, in my question I said approximately 700 head.

The Court: Seven hundred head, there wouldn't be 700 cows would there?

A. Well, 700 head of stock cattle.

Mr. Cummings: That isn't a fair question to ask.

The Court: You testify, Mr. Hill, if you know.

Mr. Johnston: Q. You know these cattle he had, you have seen them, have you, approximately all of them? A. Yes, sir.

Q. That day you were up there, there were 600 some head counted in, weren't there?

A. Yes, sir.

Q. And with this set-up that Cummings Ranch has, the amount in property up here and this down here with the cattle they have that you have seen, what could be the approximate gross income that the Cummings Ranch could make off of those cattle per year?

A. Well, I would think $6000 or $7000.

(Testimony of Russell Hill.)

Q. Would be the most?

A. That are sold out of them each year.

Mr. Johnston: You may cross examine.

Cross Examination

By Mr. Marks

Q. Where is this ranch you are in charge of?

A. Kern County, up on the Tehachapis, joining on Mr. Cummings.

Q. Adjoins his ranch? A. Yes, sir.

Q. How many cattle do you graze on it?

A. Right now we have close to 6,000.

Q. And when do you take them off pasture there in the fall?

A. The ones that we sold and the ones that we get rid of, we take off in July and August.

Q. And the ones that you don't sell that you leave on the ranch, when do you move them to your winter range?

A. Well, they drift naturally by themselves onto the winter range along in September.

Q. Where is your winter range?

A. Just all in one, comes to the San Joaquin Valley, clear down on the foot of the hill; on the hills, we don't come down to the foot.

Q. You don't come to the foot at all?

A. No, just on the hill.

Q. You don't know much about the value of the grazing then or the grass in the flat, do you?

A. Well, only from what I have seen of it, I

(Testimony of Russell Hill.)

have never run cattle on the flat outside of Greenfield and Bloomfield and that was fields, some salt grass and some bermuda.

Q. Isn't that true where the pasture he has now, isn't that salt grass and different kinds of grass?

A. Yes sir, filaree.

Q. And filaree is good feed, isn't it?

A. Very good.

Q. In fact, salt grass is all right for a time?

A. Before the storms in the fall it is all right.

Q. And after the storms it isn't so good?

A. It isn't so good.

Q. But unless there are serious storms to dry it out or affect it, it will continue for some time?

A. Yes, they won't gain on it much I don't think, they will go ahead and get along, they will live on it, yes sir.

Q. Now, on what do you base your judgment that $6,000 or $7,000 would be what 700 head of cattle should bring, do you mean profit or gross sale?

A. Well ordinarily a person should make a profit of $10 a head in growth and that is what they should make, I would think.

Q. That is annually? A. Yes sir.

Mr. Marks: I believe that is all.

Redirect Examination

By Mr. Johnston

Q. That is $10 a head gross?

(Testimony of Russell Hill.)

A. Well, that is what you ought to make out of them after you pay expenses and all, you should have $10 a head clear, they ought to grow that much.

Q. You mean net?

A. Yes, besides taking care of them.

Q. Is that based on this Cummings Ranch set-up? A. Well, I think it would be.

Mr. Johnston: That is all.

The Court: That is all.

Mr. Johnston: You haven't taken into consideration borrowed money, payment of interest on borrowed money, or anything like that? What you mean is if those cattle are turned loose and allowed to run without anyone watching them or any help?

A. Well no, I would say they ordinarily should after his running expenses would be taken out, they ought to clear him $10 a head for the year.

Q. That includes the expense he had to take in shipping them, back and forth?

A. Yes, his running expense.

(Questions propounded by the Court, and answers given by

ALBERT ANCKER,

President of Bank of Tehachapi, Appellant.)

Q. By The Court: That is true, but renewed in '34 but since then you have loaned several thousand dollars? A. Yes.

(Testimony of Albert Aucker.)

Q. And you knew what kind of business Mr. Cummings was doing, didn't you?

A. Certainly.

Q. He has reported to you how many head of cattle he had all the time hasn't he?

A. I took his word for it, certainly.

Q. Took his word for it? A. Certainly.

Q. And you were satisfied the way he was running his business?

A. I had to be satisfied because I didn't want to cripple him.

Q. And you were continually loaning money and now Mr. Johnston is trying to show that Mr. Cummings can't possibly make it?

A. He can't because he hasn't done it.

Q. For a number of years he hasn't been able to make a go of it, yet you, with your eyes open, have loaned this man several thousand dollars and you knew his business, you knew what he could make and couldn't make. He kept you informed and you had every chance to find out whether his business was paying or not, yet you were willing to loan him the money. I want the record to show that.

A. Can I answer you?

Q. Yes.

A. It is because I have been 46 years in the bank and this is the second time I have only foreclosed. I have been easy with them; that is what is the matter.

(Testimony of Albert Ancker.)

Q. I am not criticizing you for foreclosing, but why did you loan him this money all along for several years?

A. Because I thought he was honest and straight; that is the reason.

Q. Did you know he was going behind?

A. No sir.

Q. Did you try to find out if he was going behind?

A. I loaned him as thousands of others I have loaned in there.

The Court: It seems to me it comes rather late to complain about the way he is running his business now when you had all these years in the past to cut him off and say, "you are not going to get any money to run the ranch, you can't possibly make it." But you went ahead and loaned thousands of dollars.

(Reporter's Transcript of evidence taken January 20, 1939, commencing at page 56, line 5, to the end of line 13, on page 57)

The Court: Yes, but a review of this loan would show it is increasing all the time.

Mr. Ancker: Yes, increasing, the loan, certainly.

The Court: And still you keep on. If you want to throw your money away, whose fault is it but your own?

Mr. Ancker: Is that the case because I should lose it now?

(Testimony of Albert Ancker.)

The Court: No, this man is asking the Court to give him three years time and a chance to rehabilitate himself and the law has every intention of giving it to him.

Mr. Ancker: Yes, sir.

The Court: Unless you can show it is absolutely impossible for him ever to come out.

(Reporter's Transcript of evidence taken January 20, 1939, commencing at page 58, line 3, to the end of line 15, page 58).

[Endorsed]: Filed Feb. 7, 1939.

[Endorsed]: No. 9409. United States Circuit Court of Appeals for the Ninth Circuit. Bank of Tehachapi, a corporation, Appellant, vs. Cummings Ranch, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed December 28, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For The Ninth Circuit

No. 9409

In the Matter of

CUMMINGS RANCH, INC., a corporation,
Bankrupt.

APPELLANT'S DESIGNATION OF THE PART OF THE RECORD DEEMED NECESSARY AND STATEMENT OF POINTS.

Comes now Appellant, Bank of Tehachapi, and hereby designates part of the record which it thinks necessary for the consideration thereof, together with a concise statement of the points on which appellant intends to rely on the appeal. Said designation is as follows, to-wit:

1. Reporter's Transcript of testimony and proceedings of November 19, 1938 before Conciliation Commissioner Samuel Taylor, including Exhibits attached to said transcript.

2. Conciliation Commissioner's Order Fixing Rentals, etc., as attached to petition for writ of review of appellant, which petition was filed with the Clerk of the District Court on February 15, 1939.

3. Judgment of Judge Leon R. Yankwich, dated March 2, 1939, reversing Conciliation Commissioner's Orders of January 20, 1939, and February 2, 1939.

4. Petitions for Writ of Review of Bank of Tehachapi upon Conciliation Commissioner's Orders of March 25, 1939 and April 5, 1939, together with the Certificate of Conciliation Commissioner, all filed with Clerk on May 9, 1939.

5. The judgment of Judge Leon R. Yankwich appealed from, dated October 23, 1939.

6. The Notice of Appeal, with date of filing.

7. Testimony in transcript of evidence taken before Conciliation Commissioner on January 20, 1939, commencing at page 56, line 5, with the words "by the Court" to the end of line 13, on page 57, and commencing on page 58, at line 3, to the end of line 15 on page 58. Said testimony referred to herein being attached hereto, marked Exhibit "A".

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY:

I.

That the Bankrupt's petition should be dismissed because:

(1) There is no reasonable probability of ultimate debt satisfaction within the three years' period.

(2) There is no emergency existing so far as the debtor is concerned nor is there any emergency existing in the locality where the debtor's ranch is located.

(3) That the debtor cannot refinance itself within a three year period, nor is there any way by which there can be financial rehabilitation of the debtor.

(4) The Bankrupt has not offered any equitable or feasible plan for the liquidation of the secured debts of this petitioner, or debts of any other creditors within three years or any other time.

II.

That the Bank of Tehachapi should be given authority to foreclose its chattel mortgage and take any other legal steps provided in said chattel mortgage and by law to enforce payment of its indebtedness secured by said chattel mortgage because

(1) of the reasons mentioned in 1, 2, and 3 under paragraph I hereof:

(2) That to allow Cummings Ranch, Inc. to retain possession of the cattle for any time when it is shown by the testimony of Cummings Ranch, Inc. that its financial condition is such that it is hopeless for the debtor to ever settle its debts by any extension, is to allow the debtor to appropriate the mortgagee's property for debtor's benefit;

(3) It does not give the mortgagee its lien pursuant to the terms of said chattel mortgage upon the cattle.

III.

That the order of the Conciliation Commissioner fixing rental etc. dated April 5, 1939 and order of Judge Leon R. Yankwich, dated October 23, 1939 are in error because:

(1) For the reasons set forth in 1 to 3 inclusive under paragraph I and in 1 to 3 inclusive under paragraph II.

(2) The rental value was fixed upon property not owned by debtor.

(3) No evidence is before the Court to make a finding that the Conciliation Commissioner had fully complied with the order of March 2, 1939, regarding appointment of supervisor and sale of cattle to bring at least $10,000.00, or that any sum had been obtained for the sale of cattle.

(4) No evidence is before the court to make a finding that $6000.00 is reasonable rental as it existed prior to sale of cattle.

(5) No evidence is before the court to make an order that $10,404.00 or any other sum had been paid by Bankrupt to Bank of Tehachapi.

Dated: January 6, 1940.

T. N. HARVEY
C. W. JOHNSTON
CLAUDE F. BAKER
Attorneys for Appellant,
Bank of Tehachapi

[Note: Exhibit A attached hereto is omitted as same is already set forth at page 80 of this printed record as "Testimony taken before Conciliation Commissioner on January 20, 1939".]

State of California,
County of Kern—ss.

Katherine Stauss, being first duly sworn, deposes and says:

That she is a citizen of the United States, and a resident of the County of Kern, State of California;

that she is over the age of eighteen years, and not a party to the above-entitled cause; that she is a clerk in the office of Harvey, Johnston & Baker, who are attorneys for Bank of Tehachapi, Appellant herein; that on the 6th day of January, 1940, she placed a copy of the foregoing "Appellant's Designation of the Part of the Record Deemed Necessary And Statement of Points" in an envelope addressed to Samuel L. Kurland, Attorney at Law, 712 Chester Williams Building, Los Angeles, California, the attorney for the bankrupt and Appellee in said matter, sealed said envelope and deposited it in the United States Mail at Bakersfield, California, with the postage thereon fully prepaid; and that there is a regular communication by mail between the City of Bakersfield and the City of Los Angeles.

KATHERINE STAUSS

Subscribed and sworn to before me this 6th day of January, 1940.

[Seal] C. W. JOHNSTON

Notary Public in and for the County of Kern, State of California.

[Endorsed]: Filed Jan. 8, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Cummings Ranch, Inc., the appellee in the above entitled cause, does hereby designate the following record, proceedings and evidence to be contained in the record on appeal, in addition to such matter designated by the appellant:

1. That portion of the testimony taken before the Conciliation Commissioner on the 20th day of January, 1939, in the above entitled cause, and appearing in the transcript of the testimony of Edward G. Cummings, the President of the defendant corporation, on page 10 from line 16 to line 18, inclusive, and reading as follows:

> "Q. How many more cattle have you then, do you know?
>
> A. Well I can't tell any more, I know I got 705 branded and I counted 70 that were not branded."

2. That portion of the proceedings referred to in No. 1 hereof, consisting of all of the testimony of the witness Russell Hill, a witness called by the appellant, which said testimony begins on page 35 of the transcript of the hearing of January 20, 1939, and ends on page 41 thereof, at line 10.

Dated: January 20, 1940.

WILLIAM S. MARKS and
S. L. KURLAND
By S. L. KURLAND
Attorneys for Appellee.

[Affidavit of Service]

[Endorsed]: Filed Jan. 22, 1940. Paul P. O'Brien, Clerk.

No. 9409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF TEHACHAPI (a corporation), *Appellant,*

vs.

CUMMINGS RANCH, INC. (a corporation), a Bankrupt, *Appellee.*

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

T. N. HARVEY,
C. W. JOHNSTON,
CLAUDE F. BAKER,
Haberfelde Building, Bakersfield, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 9409

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Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTIONAL PLEADINGS AND FACTS.

The pleadings and facts which disclose the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the order and decree are as follows, to-wit:

1. The statutory provision to sustain the jurisdiction of this Court is sub-section a of Section 47 of Title 11 of U. S. C. A. (Section 24, Bankruptcy Act), which reads as follows, to-wit:

> "The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: Provided further, That when any order, decree, or judgment involves less than $500.00, an appeal therefrom may be taken only upon allowance of the appellate court."

2. *General Orders in Bankruptcy,* XXVII, shows that the District Court had jurisdiction. The order reads as follows, to-wit:

> "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

3. The pleadings necessary to show the existence of jurisdiction are the Order Reversing Conciliation Commissioner's Order (Tr. 22-26). The Court found that there was due to the Bank of Tehachapi over

$30,000.00 upon certain notes secured by a chattel mortgage covering all the Bankrupt's cattle, consisting of eight hundred head or more. The order of the Conciliation Commissioner approving appraisement and fixing rental (Tr. 38-42) shows that the appraised value of the cattle is $29,848.50.

STATEMENT OF THE CASE.

Cummings Ranch, Inc., a corporation, filed a debtor's petition, and failing to obtain a composition amended its petition and was adjudicated a bankrupt under Section S of Section 75 of the Bankruptcy Act. The Conciliation Commissioner fixed the rental value of all the property of the debtor at $750.00 per year (Tr. 21-22). Review was taken by Bank of Tehachapi and all of the orders of the Conciliation Commissioner were set aside and vacated, the Court having found that $750.00 per year was not a fair and reasonable rental. The Court further directed the Conciliation Commissioner to do certain things (Tr. 22-26). Thereafter the Conciliation Commissioner made an order approving appraisal and fixing rental (Tr. 38-42), the cattle being appraised at $29,848.50, and the rental value being placed on the cattle of $2203.50. The order further included $1184.00 for rental on land not owned by the Bankrupt, but as stated in the order "as now being used by debtor". Prior to the order and on or about March 24th, a hearing was had in which the Appraiser appointed by the Court testified as to the value of the property

and the rental value being the same in substance as found by the Conciliation Commissioner, and at that time the Bank of Tehachapi, and after Cummings Ranch had introduced all its testimony, made a motion that the Conciliation Commissioner recommend to the Judge of the above entitled Court to dismiss the petition (Tr. 30-32), and made a motion for order authorizing the Bank to foreclose upon its mortgage, both of which were denied, and writ of review was then taken (Tr. 26-32) and after the Court had made its order fixing the rental, dated April 5, 1939, the Bank of Tehachapi filed its petition for writ of review from said order (Tr. 34-45). The main questions raised by the motions were: first, that there is no emergency existing; second, that there is no chance for the debtor to rehabilitate itself within the three-year period; third, that said order is contrary to the provisions of sub-section 2 of Section S of the Frazier-Lemke Act, which includes property not owned by debtor; and fourth, that the order providing that the rental may be paid for State and County taxes, improvement liens, assessments and expenses of administrations is to deprive the Bank of Tehachapi of a portion of its lien upon the property under its chattel mortgage, for the benefit of other creditors, the debtor and his attorneys. Judge Leon Yankwich, on October 23rd, made his order (Tr. 46-49) confirming and approving the order of the Conciliation Commissioner, excepting he found that $10,404.00 had been paid pursuant to his order, and the writs of review of the Bank of Tehachapi were denied and exceptions were allowed.

SPECIFICATIONS OF ERROR.

Appellant specifies the following error, relied upon in this appeal, as follows, to-wit:

Specification No. 1. The Court erred in its Finding in the order dated October 23, 1939, signed by Judge Yankwich (Tr. p. 29) "in that the matter of Supervisor for the care of the cattle and the payment of $10,000.00 to the Bank of Tehachapi had been complied with"; in that there was no evidence before the Court, no evidence having been taken by the Conciliation Commissioner as to whether or not a supervisor was necessary, and no cattle had been sold when Review was taken by the Bank of Tehachapi.

Specification No. 2. The Court erred in its finding of fact in the following particulars, to-wit: That finding No. II "that sum of $10,404.00 was obtained from the sale of cattle" of the same order as mentioned in Specification No. 1, as no cattle were sold at the time Writ of Review was taken and no evidence of same was before the Court.

Specification No. 3. The Court erred in its finding of fact in the following particular, to-wit: That finding No. III as to sale of cattle of the order mentioned in Specification No. 1 is in error as there was no sale of cattle at the time of the Writ of Review or no evidence before the Court of sale of the cattle, and that the rental value should be reduced as to that portion of the property where rental is fixed upon property that is not owned by bankrupt.

Specification No. 4. The Court erred in its order as mentioned in Specification No. 1 above, for the reasons mentioned in Specifications No. 1, 2 and 3.

Specification No. 5. The Court erred in its findings of fact and in its order and decree of October 23, 1939, in that it should have granted an order to the Bank of Tehachapi dismissing the bankruptcy petition of the bankrupt Cummings Ranch and granted an order allowing the Bank of Tehachapi to foreclose upon its chattel mortgage, and should have allowed the Writs of Review of the Bank of Tehachapi of April 4, 1939 and of April 9, 1939, for the reason that the bankrupt Cummings Ranch is so hopelessly insolvent that it is impossible for it to rehabilitate itself within a three-year period or within any other time.

SPECIFICATION OF EVIDENCE.

Debtor's Indebtedness, 1923:

(Tr. 74)

Mortgage on ranch (Mrs. Kelly)	$25,000.00
Mortgage on cattle	15,000.00
Notes	5,250.00
	$45,250.00

Had on hand 800 head of cattle, 50 head of horses and 200 hogs, besides farming equipment worth $3500.00, and the ranch.

Debtor's Indebtedness, 1927:

(Tr. 75)

Mortgage on ranch (Mrs. Kelly)	$37,330.00
Mortgage on cattle (To Banks)	17,400.00
Note, J. J. Lopez	7,000.00
Note, Mrs. Asher	3,000.00
Other notes and accounts payable, about	2,300.00
	$67,030.00

Livestock and cattle approximately the same as in 1923.

Debtor's Indebtedness, 1928:

(Tr. 76)

Debtor's indebtedness at the end of the year 1928, is about the same as the year 1927, and the property owned by the corporation is approximately the same, but in addition, the statement shows that the corporation suffered a loss during the year of $2,808.13.

Debtor obtained $25,000.00 from Federal Government agency from loan on ranch and Mrs. Kelly accepted $23,-750.00 as full settlement of the note due to her of over $37,000.00; so there was a saving made by the debtor of over $14,000.00.

Debtor's Financial Condition as per Court Appraisal of April 5, 1939:

Bankrupt owns:

Real estate according to Appraisement (Tr. 39)	$40,100.00
Personal property	31,358.50
	$71,458.50

Bankrupt owes:

Bank of Tehachapi (Tr. 23) about	$33,628.00
Federal Land Bank (Tr. 63)	21,416.00
Federal Mortgage Corporation (Tr. 63)	4,997.00
J. J. Lopez (second mortgage on cattle) (Tr. 64)	12,000.00
Mrs. Charles Asher (Tr. 85)	6,983.00
Delinquent taxes (Tr. 62)	225.00
	$79,249.00

There is of course, no doubt that the Court appraisement is too high in a great many respects, and there is a lot of interest accumulation to be added to some of the indebtedness, which will make the indebtedness larger.

Overhead:

Real estate taxes are about $500.00 per year. Interest due on Federal Land Bank about 4%, which is about $1040.00 per year. Interest on other loans amounts to an average interest of 7%, which is about $2870.00. The

interest and taxes amount to *over $4000.00 a year.* This does not take into consideration anything for the operation of ranch and expense of feeding the cattle. The evidence shows that the ranch cannot be used except about five months in the year and other property has to be rented in the valley for winter range, which rental amounts to $1184.00 a year (Tr. 41). Debtor corporation also hires an additional party as caretaker, upon the winter range.

Examination by Conciliation Commissioner of Albert Ancker, President of Bank of Tehachapi, and Statements Made by Conciliation Commissioner. (Tr. 87.)

"Q. (by the Court). That is true, but renewed in '34 but since then you have loaned several thousand dollars?

A. Yes.

Q. And you knew what kind of business Mr. Cummings was doing, didn't you?

A. Certainly.

Q. He has reported to you how many head of cattle he had all the time, hasn't he?

A. I took his word for it, certainly.

Q. Took his word for it?

A. Certainly.

Q. And you were satisfied the way he was running his business?

A. I had to be satisfied because I didn't want to cripple him.

Q. And you were continually loaning money and now Mr. Johnston is trying to show that Mr. Cummings can't possibly make it?

A. He can't because he hasn't done it.

Q. *For a number of years he hasn't been able to make a go of it, yet you, with your eyes open, have loaned this man several thousand dollars and you knew his business, you knew what he could make and couldn't make.* He kept you informed and you had every chance to find out whether his business was paying or not, yet you were willing to loan him the money. I want the record to show that.

A. Can I answer you?

Q. Yes.

A. It is because I have been 46 years in the bank and this is the second time I have only foreclosed. I have been easy with them; that is what is the matter.

Q. I am not criticizing you for foreclosing, but why did you loan him this money all along for several years?

A. Because I thought he was honest and straight; that is the reason.

Q. Did you know he was going behind?

A. No sir.

Q. Did you try to find out if he was going behind?

A. I loaned him as thousands of others I have loaned in there.

The Court. *It seems to me it comes rather late to complain about the way he is running his business now when you had all these years in the past to cut him off and say, 'You are not going to get any money*

to run the ranch, you can't possibly make it.' But you went ahead and loaned thousands of dollars.

The Court. Yes, but a review of this loan would show it is increasing all the time.

Mr. Ancker. Yes, increasing, the loan, certainly.

The Court. And still you keep on. If you want to throw your money away, whose fault is it but your own?

Mr. Ancker. Is that the case because I should lose it now?

The Court. *No, this man is asking the Court to give him three years time and a chance to rehabilitate himself and the law has every intention of giving it to him.*

Mr. Ancker. Yes, sir.

The Court. *Unless you can show it is absolutely impossible for him ever to come out.''*

(Tr. 87 to 90, inc.)

POINTS OF LAW.

I.

That as to specifications of error from 1 to 4, appellant is not setting forth any decision or citation for the reason that it is too elementary that where a matter has not been heard by a Conciliation Commissioner or a Referee in Bankruptcy, that the matter is not heard before the District Judge, and the record before the Court shows that the matters complained of in Specifications Nos. 1 to 4 inclusive, were not matters to be heard or considered by Judge Yankwich,

and Judge Yankwich would not have included those matters in his order if he had known that none of them had been heard or determined by the Conciliation Commissioner at the time the Writs of Review were taken by the Bank of Tehachapi.

II.

BANKRUPT IS ALLOWED TO RETAIN POSSESSION OF HIS PROPERTY.

Paragraph 2 of sub-section (S) of Section 75 of the Bankruptcy Act provides:

> "* * * during such three years the debtor shall be permitted to retain possession of all or any part of his property in the custody and under the supervision and control of the Court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession".

III.

WHERE IT IS EVIDENT THAT REHABILITATION OF A FARM DEBTOR IS NOT POSSIBLE, THE COURT MAY DISMISS PROCEEDINGS.

Paragraph 3 of sub-section (S) of Section 75 of the Bankruptcy Act provides:

> "If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, *or is unable to refinance himself within three years, the court may order the ap-*

pointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

At page 743:

"Paragraph 3 also provides that 'if * * * the debtor at any time * * * is unable to refinance himself within three years', the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period."

Wright v. Mountain Trust Bank, U. S. Sup. Court 300 U. S. 440, 81 Law. Ed. 736.

"If there is no hope that rehabilitation can be effected in that time, so that the farmer may retain possession and still protect the rights and interest of all creditors, then a dismissal of the proceedings might be proper, or, if not a dismissal, an order permitting the creditor to foreclose its secured lien."

In Re Moser, 95 Fed. (2d) 944, 9th Circuit.

IV.

NO EMERGENCY EXISTING.

Quoting from *Wright v. Mountain Trust Bank,* at page 743, 81 L. Ed., commencing at the last sentence of that page:

"Finally, the intention of Congress to make the stay terminable by the court within the three

years is shown by paragraph 6, which declares the Act an emergency measure, and provides that: 'if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate'. Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure. When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with provisions of the Act, but with the committee reports and with the exposition of the Bill made in both Houses by its authors and those in charge of the Bill and accepted by the Congress without dissent. We construe it as giving the courts such power."

V.

THE ORDER PROVIDING THAT RENTAL MAY BE USED TO PAY TAXES AND EXPENSES OF ADMINISTRATION, DEPRIVES BANK OF A PORTION OF ITS LIEN.

Quoting again from *Wright v. Mountain Trust Bank,* at page 741, 81 L. Ed., as follows:

"Third. It is not denied that the new Act adequately preserves three of the five above enumerated rights of a mortgagee. 'The right to retain the lien until the indebtedness thereby secured is paid' is specifically covered by the pro-

visions in paragraph 1, that the debtor's possession, 'under the supervision and control of the court', shall be 'subject to all existing mortgages, liens, pledges, or encumbrances', and that:

'All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.' "

ARGUMENT.

II.

BANKRUPT IS ALLOWED TO RETAIN POSSESSION OF HIS PROPERTY.

The Bankrupt, as provided by the authorities cited under the Points of Law, is allowed to retain his property, providing he pays a reasonable rental for the same, and the order is in error in including rental of $1184.00 for rental of property "now being used but not owned by debtor" (Tr. 40). The item is No. 12 in the Conciliation Commissioner's order, and the whole thereof should have been stricken.

III.

WHERE IT IS EVIDENT THAT REHABILITATION OF A FARM DEBTOR IS NOT POSSIBLE, THE COURT MAY DISMISS PROCEEDINGS.

The Court in this case should dismiss the Bankrupt's bankruptcy petition, or should allow the Bank

of Tehachapi to take any and all legal steps under its mortgage to enforce the collection of its notes, for the reason that the Bankrupt is in such a hopelessly insolvent condition that there is no chance for Bankrupt to rehabilitate itself. The statements of the Bankrupt as to its financial condition from 1923 to date show that it has been steadily growing worse, excepting as to one year where it obtained a compromise settlement with Mrs. Kelly when she took approximately $23,000.00 to settle the indebtedness due her of $37,000.00. The Bankrupt's debts in 1923 were $45,000.00. The debts in 1927 were $68,000.00. The debts in 1928 increased and the assets decreased, and there has been since that date a steady increase in indebtedness and a steady decrease in assets. The statements of the corporation show that from the years 1923 to 1928, which were during the most prosperous years that this country has ever enjoyed, there was a loss of over $20,000.00 suffered by the corporation, or an average loss of over $4000.00 per year. Bankrupt's income from the years 1934 to 1938 inclusive, from the sale of cattle, has been approximately $16,500.00 and that amount divided by five would make a gross income of $3300.00 a year, and the corporation has no other income except a little income from the sale of chickens and a little revenue from the sale of firewood, not exceeding $100.00 a year (Tr. 99).

There is due to the Bank of Tehachapi over $33,000.00 upon notes secured by a first chattel mortgage upon the cattle, and there is due to J. J. Lopez, a note secured by second chattel mortgage upon the cattle, the balance due Lopez being $12,000.00, plus about

two years' interest at 7%. The Bankrupt has no chance to refinance itself within the next three years or to rehabilitate itself and pay off the indebtedness to the Bank and to the Lopez executor.

Both the Bank and Lopez during his lifetime, had agreed to take substantial discounts but the bankrupt was unable to secure any refinancing.

There is indebtedness of over $45,000.00 upon the cattle and the cattle are appraised at less than $30,-000.00. There is no doubt that the appraisement is too high.

The total assets as appraised by the appraiser are a little over $71,000.00 and the total indebtedness is a little over $79,000.00, but to the indebtedness there must be added interest. The overhead, interest and taxes amount to over $4000.00 a year. The amount necessary to pay for rental land is $1184.00 (Tr. 41) and the bankrupt corporation pays a caretaker $50.00 a month, plus his food (Tr. 87) which would be $600.00 a year, which would make $5784.00 per year. This does not take into consideration incidental expense, repair, upkeep, and new equipment necessary in the operation of a successful cattle ranch.

It is to be noted that of the interest, the amount due to Lopez and to the Bank of Tehachapi amounts to about $2870.00 per year, and that the $600.00, for caretaker, and the $1184.00 rental, which would make a total of $4654.00, are all necessary for the operation of the cattle. There is not at the present time nor has there been any profit from the operation of cattle by bankrupt corporation within the last fifteen years. In

fact the bankrupt corporation has been running behind at least $3000.00 per year since the year 1923.

The Conciliation Commissioner fixed the rental at $6000.00, but he built up the rental by including as heretofore pointed out to the Court, $1184.00 upon property not owned by the bankrupt but rented by the bankrupt, so that amount deducted from the $6000.00, would make the year's rent $4816.00, which is not a sufficient amount to pay the total amount of the overhead, interest, taxes, caretaker, and rental of property.

The bankrupt corporation will be no better off at the expiration of three years except that it will owe more money, but the Bank of Tehachapi will be worse off as its security will have decreased. There is no possible chance for the Bank to realize all of its money now or at a later date.

The appraised value of the cattle is between four and five thousand dollars less than the amount due to the Bank and the Lopez Executor will not release the second chattel mortgage, but insists upon payment of the indebtedness or some settlement, so that the Bankrupt cannot refinance itself in any manner.

Appellant has offered to take a substantial discount and is still willing to take a substantial discount as it knows that there is no chance for the Bankrupt to rehabilitate itself. The past performance of the officers of the bankrupt corporation shows that they cannot operate the corporation at a profit. The corporation officers have been the same for the last fifteen years.

IV.

NO EMERGENCY EXISTING.

The bankrupt corporation, as heretofore pointed out to this Court, has been insolvent for a good many years, and there is no emergency existing as far as the corporation is concerned, and the petition of the Bankrupt should be dismissed.

V.

THE ORDER PROVIDING THAT RENTAL MAY BE USED TO PAY TAXES AND EXPENSES OF ADMINISTRATION, DEPRIVES BANK OF A PORTION OF ITS LIEN.

The order provides that rental be used to pay taxes and expenses of administration, and if the rental that has been fixed as reasonable rental upon the cattle is used for any other purpose than paid to the Bank upon its mortgage, it would deprive the Bank of its lien under its chattel mortgage, for the reason that the cattle are depreciating in value each year. Cows are only good for a certain number of years. The barren cows have to be eliminated each year. New bulls should be purchased at proper intervals if the herd is to be kept up. When the herd is put out upon a rental basis, then all of the rental should be paid to the person having the first mortgage.

CONCLUSION.

We submit that the order of the Conciliation Commissioner and the order of the District Judge should be vacated and set aside, and that orders should be made authorizing the Bank of Tehachapi to foreclose under its chattel mortgage or take any other legal steps as provided under the chattel mortgage to enforce payment of its notes secured by said chattel mortgage, or that an order be made dismissing the bankruptcy proceedings.

Dated, Bakersfield, California,
February 28, 1940.

Respectfully submitted,

T. N. Harvey,
C. W. Johnston,
Claude F. Baker,
Attorneys for Appellant.

No. 9409.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BANK OF TEHACHAPI (a corporation),

Appellant,

vs.

CUMMINGS RANCH, INC. (a corporation), a Bankrupt,

Appellee.

APPELLEE'S REPLY BRIEF.

S. L. KURLAND,
712 Chester Williams Building, Los Angeles,
Attorney for Appellee.

Parker & Baird Company, Law Printers, Los Angeles.

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APPELLEE'S REPLY BRIEF.

STATEMENT OF THE CASE.

Since the statement of the case by the appellant is somewhat confused chronologically in the facts which it states which finds some support in the record, appellee outlines the history of the matter in so far as it is apparent from an examination of the transcript of the record upon the appeal.

Upon the 2nd day of February, 1939, Samuel Taylor, the Conciliation Commissioner for the County of Kern, State of California, of the United States District Court, made an Order based upon evidence that had been introduced prior thereto at hearings at Bakersfield, California, and upon the report of the appraiser. [Tr. pp. 2-4.]

(NOTE: "Tr." as used by appellant apparently referred to the pages of the original typewritten transcript, which is set forth in brackets throughout the printed transcript, and "Tr." as used in this brief shall refer to the pages of the printed transcript of the record as they appear in the above entitled appeal.)

No form of appeal from the said Order of the Conciliation Commissioner appears in the record, but on the 2nd day of March, 1939, the United States District Court for the Southern District of California, Northern Division, with the Honorable Leon R. Yankwich, Judge presiding, made an Order, apparently based upon some Petition or Petitions by the appellants, which reversed the Orders of the said Conciliation Commissioner of January 20th, 1939, and of February 2nd, 1939. [Tr. p. 7.] No Order of January 20th, 1939, appears in the record. Said Order dated March 2nd, 1939, of the said Court further required a reappraisal of the property and for the Commissioner to take additional evidence as to the reasonable rental value of the property and to take additional evidence at the same time and place as to the matter of a supervisor to supervise the care of the cattle under the Order of the Court, and to cause the sale of sufficient cattle to bring at least $10,000.00 net to the appellant Bank of Tehachapi on or before the 15th day of May, 1939. [Tr. pp. 7-8.] Thereafter, and on the 18th and 25th days of March, 1939, at Bakersfield, California, before the said Conciliation Commissioner, with all parties appearing, hearings were had and evidence was received and the new

report of the appraiser was received and filed pursuant to the said Order and Judgment of March 2nd, 1939, by Judge Leon R. Yankwich [Tr. pp. 20-24]; and thereafter, and on April 5th, 1939, the said Conciliation Commissioner made an Order in writing entitled "Order of Conciliation Commissioner Approving Appraisal and Fixing Rental". [Tr. pp. 20-24.] A Petition for Writ of Review, dated April 4th, 1939, the day prior to the making of the Commissioner's "Order Approving Appraisal and Fixing Rental" in the above entitled cause was filed in the District Court on May 9th, 1939. [Tr. p. 15.] On the 9th day of May, 1939, the said appellant also filed an additional instrument entitled "Petition for Writ of Review", which was dated April 19th, 1939 [Tr. pp. 16-26], and on May 6th, 1939, the said Conciliation Commissioner executed his certificate in the above entitled cause, which was also filed on May 9th, 1939. [Tr. pp. 26-27.]

Thereafter, and on the 11th day of September, 1939, a hearing was had before the Honorable Leon R. Yankwich upon the matters referred to in the said Petitions for Writs of Review of April 4th and April 19, 1939. [Tr. pp. 28-29.] On the 23rd day of October, 1939, the said Honorable Leon R. Yankwich made his Order, Judgment and Decree in writing which was filed in the above entitled matter on said day [Tr. pp. 28-31], and said Order and Judgment, in short, expressly confirmed the said Order of the Conciliation Commissioner of April 5th, 1939, and the Court further found in said Order and Judgment that the Commissioner had complied with each and every of the

provisions of the Order of the said Court of March 2nd, 1939, and had taken the evidence as required by said Order and said Order further found that cattle had been sold by the appellee for a net sum of $10,404.00, all of which had been paid over by the said Conciliation Commissioner to the said appellant Bank of Tehachapi to apply upon the principal of the promissory note of the appellee to the said appellant Bank, and which said Judgment further denied the Writs of Review of April 4th, 1939 and April 19th, 1939, and denied the Petition and Motion of appellant to foreclose on the chattel mortgage. [Tr. pp. 28-31.]

Thereafter, and on the 24th day of November, 1939, the appellant filed a Notice of Appeal in the above entitled cause, a copy of which said notice was served upon the appellees on the 6th day of December, 1939. [Tr. pp. 31-32.]

The record contains no transcript of the testimony or exhibits of the hearings of March 18th and March 25th, 1939, before the Conciliation Commissioner, which said hearings and the testimony and exhibits introduced therein were the basis for the said "Order of Conciliation Commissioner Approving Appraisal and Fixing Rental" [Tr. pp. 20-24] from which the Petition for Writs of Review were taken to the District Court, nor does the record contain any transcript of the proceedings of September 11th, 1939, before the Honorable Leon R. Yankwich, which said proceedings and said Order of the Conciliation Commissioner, dated April 5, 1939, are the basis of the Judgment and Order dated October 23rd, 1939, from which

this appeal has been taken. The only transcripts or summaries of the evidence in the record are of a portion of the hearings before the Conciliation Commissioner of November 19th, 1938 [Tr. pp. 34-72], and of November 22, 1938 [Tr. pp. 73-80] and of January 20th, 1939. [Tr. pp. 80-90.] Each of said hearings were prior to the Order and Judgment of the District Court of March 2nd, 1939 [Tr. pp. 4-8], reversing the Orders of the Conciliation Commissioner and requiring the Commissioner to have a reappprаisal and to take additional evidence of the rental value and to make a new order thereon, and to take evidence as to the need for a supervisor, and to cause sufficient cattle to be sold to net appellant Bank at least $10,000.00. [Tr. p. 7.]

The hearings held thereafter on March 18th and 25th, 1939 [Tr. pp. 20-21] and pursuant to said Order of the District Court, are nowhere referred to by appellant in any of the proceeding, either before this Honorable Court, or the District Court.

ARGUMENT.

The Order, Judgment and Decree of the United States District Court for the Southern District of California, Northern Division of October 23rd, 1939, from which the appellants are appealing [Tr. pp. 28-32] must be affirmed for,

I. The Stated Grounds of Appeal Are Insufficient to Justify Reversing the Judgment and Order of October 23rd, 1939.

II. The Stated Grounds for the Appeal From the Said Judgment and Order Are Not Supported by the Evidence.

I.

The Stated Grounds of Appeal Are Insufficient to Justify Reversing the Judgment and Order of October 23rd, 1939.

(1) The First Four "Specifications of Error" of the Five Stated Specifications Were Not Presented in the Court Below and Find No Support in the Record.

The Specifications of Error numbered 1 to 4 inclusive (App. Op. Br. pp. 5 and 6) do not refer to any of the matters mentioned in any of the Petitions for Writ of Review hereinbefore filed by the appellant. Specifications numbered 1, 2, 3 and 4, refer to the finding of the Court that the appellee had complied with the prior Order of

March 2nd, 1939, requiring the said appellees to sell sufficient cattle to raise not less than the sum of $10,000.00 net to be paid to the appellant Bank on or before May 15th, 1939 [Tr. pp. 6-7], and said Specifications are based upon the contention stated therein that no evidence was before the District Court as to the payment of said $10,000.00.

No denial is made that said money was paid, but appellant relies upon the technical ground that no *evidence* was before the District Court at the time of the hearing of September 11th, 1939, that the money had been paid on or before May 15th, 1939, as required in the Order of March 2nd, 1939. It has been previously pointed out that no transcript has been furnished of the proceedings before Judge Leon R. Yankwich of September 11th, 1939, or the proceedings of March 18th and March 25th, 1939, before the Conciliation Commissioner, which said latter proceedings were specified in the Order of April 5th, 1939, of the Conciliation Commissioner to be the basis of said Order [Tr. pp. 20-21] and now because of the neglect of the appellant to produce a transcript of said proceedings, or any of them, they seek to reverse the Order of the District Court.

It is elementary that the burden is upon the one urging a Writ of Review from an Order of a Conciliation Commissioner, and upon an appellant appealing from the Judgment of the District Court, in relying upon insufficiency of the evidence, to produce the evidence so that the District

Court in the first instance and the United States Circuit Court in the latter instance, may determine if there is any reasonable basis for the said Order or Orders;

In Re Harris, C. C. A. 78 Fed. (2d) 849;

Bank of Eureka v. Partington, C. C. A., 91 Fed. (2d) 587,

and further, that said objections mentioned in Specifications 1, 2, 3, and 4, were not presented to the District Court and they are not reviewable on appeal.

Hill v. Douglas, 78 Fed. (2d) 851;

Harold Lloyd v. Witwer, C. C. A. 65 Fed. (2d) 1, 15.

Nor do said specifications comply with subsection (e) of Rule 20 of the Rules of Practice of the United States Circuit Court of Appeals, for the Ninth Circuit.

No reference is had to the pages of the record where said "Assignments of Error" appear. Nor, separately, does the "Argument" in the appellant's opening brief comply with another portion of said subsection (e) of said Rule 20, in that the requirement, "such assignment of error shall be printed in full preceding the argument addressed to it", is not complied with, and no "Assignments of Error" appear preceding appellant's "Argument". (App. Op. Br. pp. 15-20.) Nor is the subject matter of the argument related to said Specifications of Error.

Section (f) of Rule 20, of the Rules of Practice of the United States Circuit Court of Appeals for the Ninth

Circuit, with reference to the requirement that a reference to the page of the record relied upon in support of each point be set forth, is violated as a uniform practice throughout the appellant's opening brief. Yet in each of such instances appellee has searched through the transcript carefully in order to ascertain whether the record supports those portions of the brief and points discussed therein, and has found no support in the record for such statements or points to which no reference to the record is made in appellant's opening brief. Appellee will not burden the Court by pointing out each of said instances but will only point out some of them during the course of the argument.

(2) The Insolvency of the Bankrupt or Its Ability to Rehabilitate Itself Is Not a Proper Matter for Consideration on This Appeal.

The ability of a bankrupt proceeding under subsection S of section 75 of the Bankruptcy Act to rehabilitate itself is not a matter for consideration upon a petition to dismiss proceedings. The opening brief of the appellant directs its argument principally to the contention that it is impossible for the appellee to rehabilitate itself within a three year period or within any other time. (App. Op. Br. pp. 6-11, 12-13, 15-18.) Assuming solely for the purpose of presenting said point, that the appellee is hopelessly insolvent and unable to rehabilitate itself, but in nowise conceding said point, the matter has been determined by the case of *Bartels v. John Hancock Mutual Life Insurance*

Company, C. C. A. 100 Fed. (2d) 813, and affirmed in 60 S. Ct. 221, 84 L. Ed. ..... The Supreme Court has expressly overruled the statement in the note in the case of *Wright v. Vinton Branch,* 300 U. S. 440, 462, 57 S. Ct. 556, 561, 81 L. Ed. 736, 112 A. L. R. 1455, to the effect that the proceedings could be dismissed because of a lack of reasonable probability of financial rehabilitation of the debtor. (*Bartels v. John Hancock etc.,* 60 S. Ct. 221, 223 and Note 3 on page 223.) As the Circuit Court in said case so aptly put it, the act is expressly extended to those who are insolvent, and further states "That he has no equity in his property but is actually insolvent is no bar". (*Bartels v. John Hancock, etc.,* 100 Fed. (2d) 813, 815, 816, and subsection (c) 11 U. S. C. A. Sec. 203 (c). See also *Federal Land Bank of Springfield v. Hansen,* 109 Fed. (2d) 139. *Paradise Land Company v. Federal Land Bank at Berkeley,* 108 Fed. (2d) 832. *Cook v. Federal Land Bank at Berkeley,* 108 Fed. (2d) 185.) The latter two cases reversed orders of the District Court which had required a dismissal of proceedings because the debtor was hopelessly insolvent.

II.

The Stated Grounds for the Appeal From the Said Judgment and Order Are Not Supported by the Evidence.

In appellee's Statement of the Case in this brief, it has been pointed out that the record contains no transcript or statement of the testimony of the hearings which form the basis of the Conciliation Commissioner's Order of April 5, 1939, in this matter, and of the subsequent Judgment and Order of Judge Yankwich approving said Order, from which Judgment and Order the appeal is taken. In any event, the arguments set forth by appellant are insufficient to set aside the judgment of the District Court. Appellant uses as a premise, its contention that a statement given by the appellee to the appellant in 1923 which showed an indebtedness of $45,250.00 (App. Op. Br. p. 6) and a statement given to said appellant Bank on December 31, 1927, showing an indebtedness of $67,030.00, and a statement of December 31, 1928, showing an indebtedness of $65,180.00, as compared to a claimed indebtedness of $79,249.00 on April 5, 1939, is conclusive of the fact that the appellee is hopelessly insolvent. [App. Op. Br. pp. 6-8; Tr. pp. 47-50.] Appellant carefully avoids reference to the fact that the real property consisting of the 5,009 acre ranch [Tr. p. 36] is exactly the same ranch as is set forth in the various statements and the live stock is approximately the same in amount and value on the date of appraisal in April of 1939, as in the statements of 1927 and 1928. [Tr. pp. 21-22, 80.] The loan in question was made and the chattel mortgage was executed in 1934. [Tr. pp. 52-56.] No claim is made that any fraud was practiced or misstatement was made at the time the note

and chattel mortgage of November, 1934, was executed and the record reveals no comparison between a statement of 1934 and of 1939. In the interim between the periods of the statements of 1927 and 1928 and the appraisal of April, 1939, this country has undergone one of the severest depressions and the greatest reductions in property value in the history of this nation, of which depression, judicial notice has been taken by almost every court. (*Nev.-Cal. Co. v. Imperial Irr. Dist.,* 85 Fed. (2d) 886; *Alexander v. State Capital Company,* 9 Cal. (2d) 304, 70 Pac. (2d) 619.)

The statement of appellant on page 8 of its opening brief that the sum of $33,688.00 is owing to it by appellee, is nowhere supported by the record either at the place cited by appellant or elsewhere. The testimony of Albert Ancker, the president of the appellant Bank, was that the sum of $27,735.00, principal and $2,193.00 interest (which totals the sum of $29,928.00) was owing in October and November of 1938 [Tr. pp. 65-66]; the chattel mortgage of appellants provides that it is security for the payment of $24,650.00, and such additional sums not to exceed $4,000.00, as shall be evidenced by additional notes, and no additional notes appear in the record or are referred to in the testimony. [Tr. pp. 52-54.] In other words, the indebtedness owed to the appellant by appellee is either $29,928.00 or $24,650.00, and in either case a cash payment had been made after the commencements of these proceedings and prior to May 15, 1939, of $10,404.00, upon the principal of said indebtedness. [Tr. p. 30.] The filing of this appeal on October 23, 1939, after such substantial payment on the indebtedness cannot help but cause one to recall the language of the Circuit Court of Appeals

in the case of *Bartels v. John Hancock Mutual Life Insurance Company,* 100 Fed. (2d) 813 at 815, wherein the court points out "the social evil of the rich becoming ever richer and the poor poorer" would be aggravated by permitting creditors to force the sale of farms or farm property because of unprofitable years due to a widespread depression.

The loose statement by appellant, without any reference to the record,

> "There is of course, no doubt that the Court appraisement is too high in a great many respects, and there is a lot of interest accumulation to be added to some of the indebtedness, which will make the indebtedness larger" (App. Op. Br. p. 8),

is not supported by any evidence of the value of the property presented before the Commissioner or the Court to rebut the appraisement nor was there any testimony of interest accumulation other than that immediately hereinbefore set forth. The next statement as to annual taxes is not supported by the record nor the next statement of appellant as to expense of feeding the cattle. (App. Op. Br. pp. 8-9.) On the contrary, the record shows that for the past twenty-five or thirty years there has not been any necessity for feeding the cattle, in other words, that they graze on the land. [Tr. p. 62.]

Appellant's point "I" under Points of Law on page 11 of its opening brief is not supported by the record for the reasons set forth hereinbefore that appellant has not produced any portion of the record of the hearing before the District Court on September 11, 1939, as to the payment of $10,404.00, on or before May 15, 1939.

Appellant's point "II" (App. Op. Br. p. 12) appears to be merely a confirmation of the right of the appellee to retain possession. There is no question but what the rental fixed by the Commissioner and approved by the Court is reasonable since the amount is $6,000.00 per year in addition to the initial payment of $10,404.00.

Appellant's point "III" (App. Op. Br. p. 12), that where rehabilitation is not possible, the Court may dismiss, has been answered.

Appellant's point "IV" (App. Op. Br. p. 13), that no emergency is existing, is not supported by any reference to the record. Testimony does appear in the record that some three or four years prior to the time of the hearing in this proceeding, the cattle business was in very bad shape and the government killed a lot of cattle. [Tr. p. 75.]

Appellant's point "V" (App. Op. Br. p. 14), contending that the rental order deprives the bank of a portion of its lien, because the taxes and upkeep of the property are to be paid first from the rent, has been answered by the Supreme Court in the case of *Adair v. Bank of America,* 58 S. Ct. 594, 303 U. S. 350, 82 L. Ed. 889.

In addition, each of the foregoing points excepting only point "I", were not referred to by appellant in its Specifications of Error. (App. Op. Br. pp. 5-6.)

Appellant's "Argument" (App. Op. Br. pp. 15 to 18), is all to the same effect, that a dismissal of the proceedings should be had because of a claimed inability of the debtor to rehabilitate. This matter has been gone into before, but the so-called "Argument" cannot be passed without some reference to some of the misstatements contained therein.

Throughout the whole of the argument, only three references are made to the transcript; the first is in support of the statement that the income of the appellee for the years of 1934 to 1938 inclusive, has been $3300.00 a year excepting only a little income from the sale of chickens and a little revenue from the sale of firewood not exceeding the sum of $100.00 a year, citing transcript page 99 (App. Op. Br. p. 16). Since the printed transcript only goes to page 97, it is apparent that appellant is referring to the bracketed number "99" on page 74. That portion of the transcript, summarized, shows that the appellee did not sell any of its cattle during the year 1938 for the reasons set forth by its president, Mr. Cummings, on page 75 of the transcript, that he was trying to bring the herd up to a certain number so he could brand 175 to 200 head of cattle per year and be justified in selling 150 for beef; and said testimony on page 74 of said transcript, in reference to the matter of chickens, shows that the living expenses of the persons connected with the corporation, has been received from the raising of chickens and that the revenue turned into the corporation from the sale of wood has amounted to over $100.00 per year. [Tr. p. 74.]

Appellant's only other statements in the whole of its arguments which contains any reference to the transcript, is that it is necessary for the appellee to rent land to graze its cattle in the winter at an annual rent of $1184.00 and that it pays a caretaker $50.00 a month plus his food, to assist in the care of the cattle. (App. Op. Br. pp. 15-20.)

The statement of the appellant on page 16 of appellant's opening brief, without any reference to the transcript, that the financial condition of the appellee has been steadily growing worse, except for the year (not stated) when a creditor took a lesser amount in settlement of an indebtedness, and the further statement that the debts in 1928, increased and the assets in 1928, decreased, in comparison with 1927, are both not supported by the record, but the record reveals them to be false. A comparison of the statement of the appellee as of December 31, 1927 [Tr. p. 49], omitting therefrom, the capital stock of $60,000.00 as a liability, shows assets in said statement of $127,-062.35, less a book deficit because of the capital stock of $12,636.25, or gross assets of $114,426.10, and liabilities of $67,062.35; the balance sheet of December 31, 1928, reveals [Tr. p. 50] assets of $125,180.12, less a book deficit of $10,754.12, or assets of $114,426.10 and liabilities of $65,180.12, which shows that the assets were the same in 1928 as in 1927, and the liabilities were reduced one year later by approximately $2,000.00.

The next statement in appellant's opening brief at page 16, that the company suffered an average loss of $4,000.00 per year from 1923 to 1928, is both immaterial, remote, and not supported by any reference to the record or by anything in the record. A comparison of balance sheets for the years of 1923 and 1928, is no criterion of the profits or loss, for the appellee may have enjoyed profits or suffered losses in the interim from the operation of the corporation, since other factors unrelated to business

profits such as a distribution of assets or distribution of dividends to members of the corporation individually, among many other things could cause such difference.

The next statement on page 16 of appellant's opening brief, is also not supported by any reference to the record, no evidence appears in the record that the income from 1934 to 1938 from the sale of cattle has been approximately $16,500.00, although it does appear in the record that during the year of 1938, no appreciable amount of cattle were sold, in order to build up the herd to an economically desirable number. [Tr. pp. 74-75.]

Appellant's next statement that over $33,000.00 is due to the appellant (App. Op. Br. p. 16), has been referred to in detail hereinbefore in this brief and it is clear that said sum does not exceed more than $30,000.00, less the payment on the principal of $10,404.00. [Tr. pp. 30, 65, 66.] At the top of page 17 of appellant's opening brief, and at the bottom of page 18, appellant has made the statement that they have offered to take and are willing to take a "substantial discount" without any reference to the record and the record will reveal no such offer. Appellee has with difficulty restrained itself from going outside the record to show appellant's real attitude in so far as its willingness to take any discount whatsoever is concerned. It would unduly prolong this brief to continue to refer to the numerous instances in the short argument of appellant wherein appellant makes purported reference to the facts without either a citation of the record in support thereof, or without any support in the record whether cited or not.

The Record Not Only Does Not Show That the Bankrupt Cannot Rehabilitate Itself But Affirmatively Shows Beyond Question That the Bankrupt Can and Should Rehabilitate Within the Period Provided by Law.

The president of the bankrupt corporation testified that it is feasible to sell 150 head of cattle per year and that it was his intention to sell 108 head for a gross of $8,000.00 to $10,000.00 [Tr. pp. 75-76], and further testified that there are 775 head of cattle available. [Tr. p. 80.] Russell Hill, the witness for *appellant,* who testified that he is managing the ranch adjoining that of the bankrupt corporation, and has been in the ranching business for thirty years and has been acquainted with the property of the appellee for thirty-five years [Tr. pp. 81-82], further testified that the cattle should net $10.00 a head clear per year for each of said head of cattle [Tr. p. 87], which, on the basis of 775 head, should allow a net profit of $7750.00 from the cattle alone. In addition to the living expenses being taken care of by the chickens on the ranch [Tr. p. 74], the ranch has a contract that calls for $8,000.00 a year for the sale of timber thereon and the testimony shows that the ranch has the equipment in its lumber mill capable of handling such timber. [Tr. pp. 76-77.]

Conclusion.

In the instant case, we have one creditor complaining because the proceedings are not dismissed, although after the proceedings had commenced and prior to the appeal, it was paid more than one-third of its obligation; and although a rental order has been made providing for an annual payment of $6,000.00, and although the income of the debtor varies somewhere between $7,750.00 and $17,000.00 per year.

Appellee, whose income is derived from cattle raising, poultry raising, and timber, presents a case of the very type of farmer and the very class of person for whom the beneficial provisions of the Frazier-Lemke Act were enacted.

Wherefore, it is respectfully submitted that the Order, Judgment and Decree appealed from, should be affirmed and sustained.

Respectfully submitted,

S. L. KURLAND,
Attorney for Appellee.

No. 9409

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CUMMINGS RANCH, INC. (a corporation), a Bankrupt,
Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

APPELLANT'S REPLY BRIEF.

T. N. HARVEY,
C. W. JOHNSTON,
CLAUDE F. BAKER,
Haberfelde Building, Bakersfield, California,
Attorneys for Appellant.

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No. 9409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF TEHACHAPI (a corporation),
Appellant,

vs.

CUMMINGS RANCH, INC. (a corporation), a Bankrupt,
Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

APPELLANT'S REPLY BRIEF.

ADDITIONAL STATEMENT OF THE CASE.

We believe that the statement of the case of appellant in its opening brief fully covers the matters involved, but since the appellee has criticized the statement of facts of the appellant, we believe it advisable to make an additional statement of facts ("Tr." as hereinafter designated in this brief refers to the printed transcript of record instead of the original certified transcript of record). The record shows:

1. Order dated March 2, 1939 (Tr. 4) reversing Conciliation Commissioner's orders, and the order further found that the appellee was indebted to the appel-

lant in a sum of money exceeding $30,000.00, said indebtedness being secured by chattel mortgage upon the cattle, and J. J. Lopez had a second lien upon the cattle in the sum of approximately $12,000.00, and required the Conciliation Commissioner to have a re-appraisement made of the property, fix rental, and other matters as set forth in said order.

2. That at hearing had on January 25, 1939 before Conciliation Commissioner, evidence was introduced on behalf of the appellee as to the value of both the real and personal property and thereupon appellant made motion for an order authorizing the bank to foreclose its mortgage, and a motion that the Conciliation Commissioner recommend to the judge of the above entitled Court to dismiss the bankruptcy petition. Both motions were denied and writ of review was taken by appellant (Tr. 9-14). Pages 12, 13 and 14 contain copies of the motions. The appeal was filed with the Conciliation Commissioner on April 5th.

3. Thereafter the Conciliation Commissioner made his order approving appraisal and fixing rental (Tr. 20) and appellant filed petition for writ of review on same with the Conciliation Commissioner on April 21st.

4. Judge Leon Yankwich on October 23, 1939, after hearing on September 11, 1939, made his order confirming and approving the order of the Conciliation Commissioner, excepting that he found $10,404 had been paid pursuant to his order. The writs of review of appellant were denied and exceptions were allowed.

5. After the two writs of review had been filed with the Conciliation Commissioner and on May 11, 1939, 200 head of cows and steers were sold (see Exhibit "A" attached to this brief). We are requesting the Conciliation Commissioner to forward a certified copy of the order for the Court's information.

The writs of review were taken upon the two motions (Tr. 13 and 14) and upon the Conciliation Commissioner's order (Tr. 20-24). Appellee complains that there is no transcript of the hearing before Judge Yankwich. There was no evidence introduced and consequently there would be no transcript. There were no exhibits introduced before the Conciliation Commissioner at the hearings upon which he fixed his appraisal and the evidence given upon which the Conciliation Commissioner based his appraisal and rental value was the same as in his order.

ARGUMENT.

There are five specifications of error which are set forth in our opening brief, but will be also hereinafter set forth for the purpose of convenience to the Court. They are as follows:

SPECIFICATIONS NOS. 1 AND 2.

Specification No. 1. The Court erred in its finding in the order dated October 23, 1939, signed by Judge Yankwich (Tr. 29) "in that the matter of Supervisor for the care of the cattle and the payment of $10,000.00 to the Bank of Tehachapi had been complied with"; in that there was no evidence before the

Court, no evidence having been taken by the Conciliation Commissioner as to whether or not a supervisor was necessary, and no cattle had been sold when review was taken by the Bank of Tehachapi.

Specification No. 2. The Court erred in its finding of fact in the following particulars, to-wit: That finding No. II "that sum of $10,404.00 was obtained from the sale of cattle" of the same order as mentioned in Specification No. 1, as no cattle were sold at the time writ of review was taken and no evidence of same was before the Court.

Exhibit "A" attached to this brief shows that the sale of the cattle was made on May 8th and the order was signed on May 11th, which was after both of the writs of review had been taken and should not have been included in the order of Judge Yankwich; and we do not believe that Judge Yankwich would have included the same in the order if he had known that the order confirming sale had not been made by the Conciliation Commissioner until after date of filing writs of review. If it is allowed to stand or be considered, then appellant should be allowed to comment upon the same.

The contention of appellee that this matter was not raised by appellant in the District Court is correct. The question here is not whether or not the question was raised by appellant in the District Court, but that there was included in the order of the district judge a condition which was not raised upon the hearing, and which happened after the writs of review were taken.

SPECIFICATIONS NOS. 3 AND 4.

The Court erred in finding No. 3 (Tr. 30), "that the sum of $6000.00 is the reasonable rental value for the property of the debtor company as it existed prior to the sale of said cattle". A portion of the argument upon these specifications is included in the argument under specifications 1 and 2, in that there was no sale of cattle at the time of the writs of review and consequently no evidence before the district judge as to the sale of the cattle, and the further specification that the rental value should be reduced as to that portion of the property upon which rental is fixed upon the property not owned by the bankrupt.

The order of the Conciliation Commissioner dated April 5, 1939 (Tr. 23), as to the rental value of property not owned by the debtor is as follows:

> "(12) That the rental value of Railroad Land now being used but not owned by debtor is $675.00; that the rental value of the camp and well on said premises is $125.00; and that the rental value of the McWilliams property rented but not owned by debtor is $384.00 making a total of $1184.00 rental for this land not owned."

The Bankruptcy Act provides that the bankrupt shall be permitted to retain possession of his property *and the property now being used but not owned by the debtor is not property of bankrupt within the meaning of* paragraph 2 of subsection (s) of Section 75 of the Bankruptcy Act, which provides as follows:

> "* * * during such three years the debtor shall be permitted to retain possession of all or any part of his property in the custody and under

the supervision and control of the Court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession."

SPECIFICATION NO. 5.

Specification No. 5. The Court erred in its findings of fact and in its order and decree of October 23, 1939, in that it should have granted an order to the Bank of Tehachapi dismissing the bankruptcy petition of the bankrupt Cummings Ranch and granted an order allowing the Bank of Tehachapi to foreclose upon its chattel mortgage, and should have allowed the writs of review of the Bank of Tehachapi of April 4, 1939 and of April 9, 1939, for the reason that the bankrupt Cummings Ranch is so hopelessly insolvent that it is impossible for it to rehabilitate itself within a three-year period or within any other time.

Appellant's opening brief, pages 6 to 11 inclusive, sets forth evidence showing the insolvency of appellee and the fact that said appellee cannot rehabilitate itself within the three year period or any other time.

Since the hearing and since this appeal has been taken the Conciliation Commissioner has made an order finding in substance that the bankrupt was not the owner of the real property. A copy of the order is attached to this brief and marked Exhibit "B", and a certified copy has been requested from the Conciliation Commissioner to be sent to the above Court. We believe that under the citations in *Ridge v.*

Manker, 132 Fed. Rep. 599 (C. C. A. 8th Circuit), which is as follows:

> "An appellate court may avail itself of authentic evidence outside of the record before it of matters occurring since the decree of the trial court, when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuity of proceedings, to preserve a jurisdiction lawfully acquired or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled or for other reasons has ceased to exist."

and under the case of *Kendall v. Ewert,* 259 U. S. 139 (66 L. Ed. 862), in which the Supreme Court held in substance that evidence tending to show a dismissal may be considered on appeal when it is presented to and urged upon the attention of the Federal Supreme Court in support of a motion to dismiss the appeal on grounds that the case had been dismissed after the appeal was taken, that appellant is entitled to present such fact to this Court so that the Court will be fully advised. Appellant certainly would be entitled to present the same if the appellee was entitled to an order in the District Court including matters heard by the Conciliation Commissioner after the writs of review were taken.

ADDITIONAL REFERENCES TO EVIDENCE.

Appellee has stated in his brief that the claims of appellant are not supported by the record and that some of the statements of appellant as to the evidence

are false, and we wish to take up each one of such references of appellee to the evidence, and call to the Court's attention the place where the evidnce can be found. (For convenience whenever appellee's reply brief is referred to it will be labeled "A" with the number of the page thereafter, and whenever reference is made to appellant's opening brief, it will be labeled "App." with the number of the page thereafter.)

A. Appellee (A-11) states that the livestock for the years 1927 and 1928 is approximately the same as in April 1939 and further states that we did not call the Court's attention to the same.

We called the Court's attention (App. 6-7) to the fact that in 1927 the cattle and livestock were approximately the same as in 1923, which showed 800 head of cattle, 50 head of horses and 200 hogs. The appraisement shows 759 head of cattle, including calves (Tr. 23) and 15 horses. At the first hearing appellee testified (Tr. 57) that there was on hand at that time, which was in November, 1938, 703 head. It is evident that there was a decrease.

B. Appellee (A-12) states that the statement on page 8 of appellant's openng brief that about $33,-688.00 was owing, is not supported by the evidence and is incorrect.

Judge Yankwich's order (Tr. 6) found that there was over $30,000.00 due to the Bank of Tehachapi and the transcript showed that there was $29,928.00 principal and interest due in November and October of 1938 (Tr. 65-66).

The $30,000.00 would have interest added thereto of approximately $2000.00. There are other items such as $400.00 for costs on bond, $100.00 advanced to bankrupt per order of Conciliation Commissioner to count cattle at the time of the sale, attorneys fees and other items which are part of the indebtedness, and which latter items we admit are not covered by the transcript, but it is immaterial whether it is $32,000.00, $30,000.00 or $34,000.00 that is due by the appellee to appellant. The appellant is going to suffer loss regardless of the amount.

C. Appellee states that there is no evidence in the record to show the taxes (A-13).

Reference is made (Tr. 36) to the testimony of Mr. Cummings, the president of appellee, in which he states in substance that the second payment of taxes had not been made and is delinquent in the sum of $225.00, which would make taxes approximately $450.00, and at page 50 of the transcript, the yearly statement shows taxes paid in the sum of $440.72.

D. Appellee states that it did not sell cattle for the year 1938 for the reasons set forth by Mr. Cummings (A-15).

We have not maintained that he sold any cattle during the year 1938, but we do maintain that during the five years prior to the filing of the bankruptcy petition, including 1938, which was the year the bankruptcy petition was filed, the average price received for the sale of cattle was not greater than $3300.00 per year. At the hearing Mr. Cummings, president

of the bankrupt, testified that there was on hand 703 head of cattle in the fall of 1938 (Tr. 57). He further stated that he did not sell any cattle during 1938, building the herd up, so that the increases during the year 1938 with no cattle sold during that period was approximately 100 less than called for by the chattel mortgage of appellant. *What became of the other cattle?*

E. Appellee (A-16) states that the statement made by appellant (App. 16) "that the financial condition of appellee has been steadily growing worse, excepting for the year when a creditor took a lesser amount in settlement of an indebtedness, and the further statement that the debts in 1928 increased and the assets in 1928 decreased, in comparison with 1927" are not supported by the record, but that the record reveals them to be false.

What the appellant said is as follows: "The statements of the Bankrupt as to its financial condition from 1923 to date show that it has been steadily growing worse, excepting as to one year where it obtained a compromise settlement with Mrs. Kelly when she took approximately $23,000.00 to settle the indebtedness due her of $37,000.00. The bankrupt's debts in 1923 were $45,000.00. The debts in 1927 were $68,000.00. The debts in 1928 increased and the assets decreased, and there has been since that date a steady increase in indebtedness and a steady decrease in assets" (App. 16). The year "1928" should have been the year "1927".

Appellee owed $45,250.00 in 1923 (Tr. 48);

Appellee owed $67,062.35 in 1927 (Tr. 49);

Appellee owed $65,180.12 in 1928 (Tr. 50).

Appellee owes now about $79,249.00 according to the items set forth on page 8 of appellant's opening brief. In 1923 and 1927 appellee had on hand 800 head of cattle, 200 hogs, and 50 head of horses. At the time of the appraisement appellee had on hand about 759 head of cattle and about fifteen horses.

We believe that the record shows that we are correct that *the financial condition of the appellee from 1923 to date has steadily been growing worse.* Mr. Cummings, president of appellee, testified (Tr. 39) regarding the Kelly loan as follows:

"Q. Now, when you borrowed the money from the Federal Land Bank, this Twenty Five Thousand Five Hundred Dollars, what did you do with the money you got from the Federal Land Bank?

A. I paid off the old note to Mrs. Kelly.

Q. And how much was her note?

A. A great deal more than that, I don't remember, but she was going to take that as payment for the amount we owed her."

The financial statement of appellee on December 21, 1928 (Tr. 50) showed indebtedness to J. W. Kelly of $37,330.12 and the statement of December 31, 1937 (Tr. 49) also shows the same amount. It is evident that we are again correct that there was due at least $37,000.00 to Mrs. Kelly and she took approximately $23,000.00 to settle the debt. The $23,000.00 is arrived at by deducting the approximate amount of stock that was required to be purchased from the Federal Land

Bank at the time of the loan, but it is immaterial to us whether the matter is considered as $23,000.00 or $25,000.00. It proves our contention that there was a scaling down of debts at that time. True, the record upon appeal does not show the year of the transaction but it was between 1928 and 1938 and there was a benefit obtained by appellee by the scaling down of the debt.

IMPOSSIBLE FOR APPELLEE TO REHABILITATE ITSELF.

This matter has been covered in appellant's opening brief. It shows that the appellee not considering the sale of cattle and not considering the fact that the real property has been taken out of the proceedings, was in such a hopelessly insolvent condition that it is impossible for it to rehabilitate itself, nor is it possible to pay the costs and expenses of operation, and interest, out of the rental required to be paid into the Court.

If the sale of the cattle is to be included in the order, then it merely reduces the debt to the appellant in the amount received from the sale of the cattle, and reduces the value of the cattle in the same amount of $10,404.00, which makes the balance of the cattle valued at $19,444.50. It reduces the rental value on the cattle from $2203.50 to $1698.50, by deducting 202 head times $2.50 rental value. The cost and expenses of operating the cattle would be the same. The only reduction would be upon the interest upon the amount paid to the bank.

If the Court considers "Exhibit B" which shows dismissal as far as the property is concerned, then, of course, there should be deducted the value of the real property from the assets and there should likewise be deducted the liability due to the Federal Land Bank, which would only leave on hand the personal property of $31,358.50, after deducting the sale price of the cattle of $10,404.00 which would make the value of the assets $20,954.50. The debts would be: Bank of Tehachapi, about $22,000.00, J. J. Lopez (Tr. 6) second mortgage, $12,000.00, Mrs. Charles Asher (Tr. 60), $6983.00, which would make the total debts $40,983.00. This does not include interest computed on Lopez debt and on the Mrs. Charles Asher debt. The debts are approximately twice the value of the remaining assets.

The argument by appellee on page 18 that the president of the bankrupt corporation testified that it was feasible to sell 150 head of cattle per year and that it was his intention to sell 108 head for a gross of eight to ten thousand dollars, and that the testimony of witnesses that the bankrupt should net $10.00 per head per year for the cattle, and that the ranch had a contract for $8000.00 a year for the timber, and that this proves that appellee can rehabilitate itself is ridiculous. We must go not only on present conditions but on past history and past performance of appellee. The record shows in Exhibit A to this brief that it was necessary to sell two hundred head of cattle instead of 108 to bring $10,000.00.

The statement of Russell Hill (Tr. 81-82 and 87) merely shows that the appellee should make $10.00

profit per head off of the cattle, but the appellee corporation has not done it and it further goes to show that there is no chance for rehabilitation. The contract for $8000.00 for the sale of timber (Tr. 76) in substance shows that a number of people have tried to operate the mill and have gone broke. Mr. Cummings further stated that "the contract calls for $8000.00 a year for the first two years; of course, this year I know we can't get that".

Conciliation Commissioner took the view and the appellee takes the view that once the petition has been filed by a farmer debtor, that the petition cannot be dismissed for a three year's period regardless of whether or not there is any reasonable probability for the farmer debtor to rehabilitate himself, and cites the case of *John Hancock Mutual Life Ins. Co. v. Bartels,* 84 L. Ed. 154, as holding that the proceedings could not be dismissed even if the debtor has no chance to rehabilitate itself.

The decision in the *Bartel* case did not overrule the decision of *Wright v. Mountain Trust Bank,* U. S. Sup. Ct. 300 U. S. 440, 81 L. Ed. 736, but merely held the same as the decision in the *Moser* case, Ninth Circuit, 95 Fed. (2d) 944, that a farmer debtor, if he could not obtain an extension or composition, is entitled to be adjudged a bankrupt under subsection (s) and that a dismissal is not in order until after he has had his property appraised and his exemption set aside to him by state law.

> "The facts are that the District Judge found that the debtor had not made any proposition which

could be construed as a good faith offer for extension or composition and that the debtor was not entitled to be adjudicated a bankrupt under subsection S."

John Hancock Mutual Life Ins. Co. v. Bartels, 84 L. Ed. 154, 155.

At page 157 of the decision, after the Court had discussed the fact that a person was entitled to be adjudicated under subsection (s), states:

"He was so adjudicated. Bartels then asked, also as provided in subsection (s), that his property be appraised, that his exemptions be set aside to him as provided by state law, and that he be allowed to retain possession of his property under the supervision of the court, *that is, subject to such orders as the court might make in accordance with the statute.* The court failed to take that action. Instead of having the property appraised, the court received conflicting testimony as to value, discussed the chances of the debtor's rehabilitation and dismissed the petition and all proceedings thereunder."

Further upon the same page, the Court continues:

"If the court finds it necessary to protect the creditors 'from loss by the estate' or 'to conserve the security', the court may order any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, to be sold at public or private sale, and the court, in addition to the prescribed rental may require payments to be made by the debtor on the principal of his debts in the manner set forth."

Further, at pages 157-158 of the decision, the Court states:

> "If, however, the debtor at any time fails to comply with the provisions of the section or with any orders of the court made thereunder, *or is unable to refinance himself within three years, the court may order the appointment of a trustee and direct the property to be sold or otherwise disposed of as provided in the act.*"
>
> "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, *while protecting the interest of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims,* the priorities and liens of secured creditors being preserved. See Wright v. Vinton Mountain Trust Bank."

CONCLUSION.

If the real property is eliminated then but three creditors are left, the appellant; Lopez, with the second mortgage, and Mrs. Asher, as the Federal Land Bank's claim could not be considered. While Mrs. Asher is not a party of record to the appeal, nevertheless Mrs. Asher is represented by the attorneys for the appellant and she desires the proceedings dismissed in the same manner as the appellant.

There is nothing in the record to show that the appellee ever had an income as set forth in appellee's brief (p. 19) from $7750.00 to $17,000.00 per year, or any other sum in excess of an average of

$3500.00 in the last five years prior to the filing of the bankruptcy petition, *and that amount was the gross for the sale of cattle and not the net.* The evidence in the record shows that the order should be made authorizing the Bank of Tehachapi to foreclose under its chattel mortgage or take any other legal steps as provided under the chattel mortgage to enforce payment of the notes secured by the chattel mortgage, or that an order be made dismissing the bankruptcy petition.

Dated, Bakersfield, California,
May 1, 1940.

Respectfully submitted,
T. N. HARVEY,
C. W. JOHNSTON,
CLAUDE F. BAKER,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

EXHIBIT "A"

In the District Court of the United States, for the Southern District of California, Northern Division

No. 4927

In the Matter of
Cummings Ranch, Inc. (a corporation),
Bankrupt.

ORDER CONFIRMING SALE.

The petition of the above bankrupt for an order authorizing the sale of one hundred fifty (150) steers and fifty (50) head of dry cows to the Kern Valley Packing Company, a corporation, for the sum of $10,300.00, according to bid attached to the petition, came on regularly for hearing at four o'clock P. M. on Monday, May 8, 1939, and it appearing to the Court, and the Court finds that J. J. Lopez, who has a second lien upon the cattle being in the form of a chattel mortgage, consented to the sale, and consented that the proceeds from said cattle be paid to the Bank of Tehachapi, which bank had a first lien in the form of a chattel mortgage upon said cattle, and the Bank of Tehachapi having consented to said sale upon the terms and conditions mentioned in the petition, and it further appearing to the Court that the brand of the above bankrupt is CL, and that the bid of the Kern Valley Packing Company was that it could select any 150 steers, and any 50 dry cows, and the

president of the bankrupt being present in Court, and the bankrupt's attorney being present in Court, and the attorney for the Bank of Tehachapi being present; and it appearing to the Court that a better price cannot be obtained for said cattle, and no one appearing and offering to bid a greater sum for said cattle, and that said sum so bid is the fair and reasonable market value for said cattle, and no one appearing to object to said petition, and it further appearing from the petition that the bankrupt has agreed that a delivery of a certified copy of the order confirming sale to the purchaser upon the payment of the money to the Bank of Tehachapi should be a sufficient conveyance of the property so purchased, and the Court being fully advised,

It is therefore ordered, adjudged and decreed that the sale be, and the same is hereby confirmed, and that the Kern Valley Packing Company is hereby ordered to immediately pay to the undersigned Conciliation Commissioner the total sum of said bid, that is, the sum of ten thousand three hundred dollars ($10,300.00), and thereupon the said sum of $10,300.00 shall be paid to Harvey, Johnston & Baker, attorneys for the Bank of Tehachapi, and thereupon the said purchaser, Kern Valley Packing Company, shall be entitled to take possession of said cattle free and clear of liens of the Bank of Tehachapi and J. J. Lopez, and that the delivery of the certified copy of this order confirming sale to the purchaser is a sufficient conveyance of the property so purchased.

Dated, May 11, 1939.

Samuel Taylor,
Conciliation Commissioner.

EXHIBIT "B"

In the District Court of the United States
In and for the Southern District of California
Northern Division

No. 4927

In the Matter of
Cummings Ranch, Inc. (a corporation),
Bankrupt.

ORDER.

WHEREAS, The Federal Land Bank of Berkeley, a corporation, and the Federal Farm Mortgage Corporation, a corporation, filed herein on November 28, 1939 their Petition and Motion to Strike moving that the real property described in Paragraph II of said petition be, by order of this Court, stricken from the schedules filed herein by the above named debtor, and that it be adjudged that said real property is no part of the assets of the estate of said debtor and that this Court has no jurisdiction thereover, and

WHEREAS, said petition, pursuant to the previous order of this Court, came on regularly for hearing before me on the tenth day of February, 1940, the debtor appearing by its attorneys, William S. Marks and Samuel L. Kurland, and said petitioners appearing by one of their attorneys, M. G. Hoffman,

Now Therefore, the Court having considered said petition, the records and files in this cause and the matters adduced at said hearing and it appearing to the Court therefrom, and the Court finds:

(1) That on the first day of February, 1934, Edward G. Cummings, George A. Cummings, Clarence C. Cummings, Edward J. Cummings, Frank R. Cummings and Albert N. Cummings were the owners of the real property described in Paragraph II of said petition.

(2) That on said date said owners made, executed and delivered to The Federal Land Bank of Berkeley and to the Land Bank Commissioner, predecessor of the Federal Farm Mortgage Corporation, certain notes and deeds of trust; that The Federal Land Bank of Berkeley and the Federal Farm Mortgage Corporation are now secured creditors of said owners.

(3) That Frank R. Cummings conveyed his interest in said property to Edward G. Cummings and that Edward G. Cummings, George A. Cummings, Clarence C. Cummings, Edward J. Cummings, and Albert N. Cummings are now the owners of the real property described in Paragraph II of said petition.

(4) That the debtor corporation is not the owner of any vested interest in the property which is described in Paragraph II of said petition; that said real property is no part of the assets of the debtor's estate and that this Court has no jurisdiction thereover.

Now, Therefore, the Court being fully advised in the premises,

It Is Ordered that the real property described in Paragraph II of said petition be stricken and it is hereby stricken from the schedules of the above named debtor; that the property stricken from the schedules is described as follows:

Parcel A: All of fractional Section 3, East half of Northeast quarter, West half of Northwest quarter, Southeast quarter of Northwest quarter, Southwest quarter, Northeast quarter of Southeast quarter and South half of South half of Southeast quarter of fractional Section 4; all of fractional Section 5 except Lot 4 (otherwise known as Northwest quarter of Northwest quarter), North half of North half of Section 8; all of Section 9, West half of East half of Section 10, North half of Section 14, Northeast quarter, East half of Northwest quarter, Northwest quarter of Northwest quarter, North half of Southeast quarter and Northeast quarter of Southwest quarter of Section 16; all in Township 11 North, Range 16 West, San Bernardino Base and Meridian; all of Fractional Section 33, Township 12 North, Range 16 West, San Bernardino Base and Meridian; all of Fractional Section 31, Township 32 South, Range 32 East, Mount Diablo Base and Meridian, Kern County, California.

Parcel B: All of Lots 2 and 3, Southwest quarter of Northeast quarter, Northwest quarter of Southeast quarter of Fractional Section 4, Township 11 North, Range 16 West, San Bernardino Base and Meridian, Kern County, California.

Parcel C: North half of South half of Southeast quarter of fractional Section 4, Township 11 North, Range 16 West, San Bernardino Base and Meridian, Kern County, California.

PARCEL D: South half of North half of Section 8, Township 11 North, Range 16 West, San Bernardino Base and Meridian, Kern County, California.

PARCEL E: West half of West half of Section 10, Township 11 North, Range 16 West, San Bernardino Base and Meridian, Kern County, California.

The property herein described contains 5109 acres, more or less.

EXCEPTING THEREFROM the following: Beginning at the point of the Northwest corner of the Southwest quarter of Section 3, Township 11 North, Range 16 West, San Bernardino Base and Meridian; thence East 209.71 feet; thence South 208.71 feet; thence West 208.71 feet; thence North to the point of beginning containing 1 acre, more or less.

Dated this 1st day of March, 1940.

Samuel Taylor,
Referee.

Def. 1
Def. 2